192

74945
Sup. Ct.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945 46

No. 864 146

RICHFIELD OIL CORPORATION, APPELLANT,

vs.

STATE BOARD OF EQUALIZATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED FEBRUARY 18, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 864

RICHFIELD OIL CORPORATION, APPELLANT,

vs.

STATE BOARD OF EQUALIZATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX

	Original	Print
Record from Superior Court of Sacramento County	1	1
Caption (omitted in printing)	2	
Complaint	3	1
Exhibit "A"—Letter enclosing check in payment of tax under protest	17	10
Exhibit "B"—Claim for refund	19	11
Answer	27	16
Stipulation as to certain facts	30	18
Exhibit "A"—Request of New Zealand Government Stores Control Board	34	20
Exhibit "B"—Contract for sale of fuel oil	36	22
Exhibit "C"—Export declaration	43	26
Exhibit "D"—Bill of lading executed by Master of R. F. A. "Nucula"	44	27
Minute entry of hearing	50	31
Supplemental stipulation of facts	51	31
Opinion of the Court, Shields, J.	52	32
Findings of fact and conclusions of law	77	47
Judgment	103	65
Stipulation amending stipulation of facts	104	66
Notice of appeal	107	68
Notice to prepare transcript	108	68
Clerk's certificate (omitted in printing)	110	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 16, 1946.

	Original	Print
Proceedings in Supreme Court of California	111	70
Entries in Register of Actions	111	70
Opinion, Gibson, C. J., December 30, 1944	113	71
Dissenting opinion, Carter, J.	125	79
Order granting rehearing	137	85
Opinion, Carter, J., November 1, 1945	138	85
Dissenting opinion, Gibson, C. J.	149	92
Judgment	160	99
Order denying rehearing	161	99
Petition for appeal, assignments of error, and prayer for reversal	163	100
Order allowing appeal	170	103
Citation on appeal (omitted in printing)	172	
Bond on appeal (omitted in printing)	175	
Praecipe for transcript of record	177	105
Clerk's certificate (omitted in printing)	179	
Statement of points to be relied upon and designation of record	181	106
Order postponing further consideration of question of jurisdiction to hearing on merits	184	107

[fols. 1-2] [Caption omitted]

[fols. 3-4]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SACRAMENTO

No. 65798. Dept. 2

RICHFIELD OIL CORPORATION, a Corporation, Plaintiff,

vs.

STATE BOARD OF EQUALIZATION, Defendant.

COMPLAINT FOR RECOVERY OF SALES TAX ILLEGALLY COLLECTED —Filed December 14, 1942

Comes now the Plaintiff and for cause of action against the Defendant alleges:

I

That Plaintiff is a corporation duly organized under and by virtue of the laws of the State of Delaware and is authorized to do business in the State of California.

II

That the Defendant, State Board of Equalization, is the administrative body or agency of the State of California designated in Section 31 of the California Retail Sales Tax Act, as amended, as the party against which an action shall be brought for refund of taxes collected under such Act.

III

That on March 12, 1937, Richfield Oil Company of California, a Delaware corporation, and William C. McDuffie, as Reorganization Trustee of Richfield Oil Company of California, assigned, transferred and set over unto the Plaintiff herein all properties, property rights and assets of every nature and description owned by Richfield Oil Com- [fol. 5] pany of California, a Delaware corporation, and by the said William C. McDuffie in his capacity as Reorganization Trustee of Richfield Oil Company of California. That said transfer was made in pursuance of an

Order Confirming Plan of Reorganization of Richfield Oil Company of California made and entered on December 23, 1936, by the United States District Court for the Southern District of California, Central Division, in Proceedings pursuant to Section 77B of the National Bankruptcy Act entitled "Richfield Oil Company of California, a corporation, Debtor; Pan American Petroleum Company, a corporation, Subsidiary; In Proceedings for the Reorganization of a Corporation, No. 28700-J." That in pursuance of said Plan of Reorganization, Plaintiff Richfield Oil Corporation assumed the duties, liabilities and obligations of William C. McDuffie as Receiver of Richfield Oil Company of California and of William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California.

IV

That at all times herein mentioned William C. McDuffie, as Receiver of Richfield Oil Company of California, and William C. McDuffie, as Reorganization Trustee of Richfield Oil Company of California and Plaintiff Richfield Oil Corporation have held valid and existing retailers' permits issued by the State Board of Equalization in pursuance of the provisions of the Retail Sales Tax Act of 1933, as amended.

[fol. 6]

V

That Notice of Assessment dated September 25, 1940 was issued by the State Board of Equalization and directed to Richfield Oil Corporation, which said notice stated an additional assessment in the total sum of Three Hundred Fifty-four Thousand Ninety-six and 73/100 Dollars ($354,096.73) for the taxable period April 1, 1937 to March 31, 1940, which sum included interest to October 15, 1940. That thereafter and on or about October 22, 1940, Plaintiff filed with the State Board of Equalization a Petition for Reassessment, Issue I of which protested against the action of the State Board of Equalization in including in the measure of the additional tax assessment an amount of Thirty-eight Thousand Eight Hundred Forty and 70/100 Dollars ($38,840.70) representing the "gross receipts" of an export sale to New Zealand, a Dominion of the British Empire, of petroleum products during the taxable period April 1, 1937 to June 30, 1937. That the additional tax

assessed thereon at the rate of three per cent (3%) amounted to One Thousand One Hundred Sixty-five and 22/100 Dollars ($1,165.22). That on or about May 7, 1942 the State Board of Equalization reassessed against Plaintiff the additional tax of One Thousand One Hundred Sixty-five and 22/100 Dollars ($1,165.22) and interest thereon to July 15, 1942 in the amount of Three Hundred Forty-nine and 56/100 Dollars ($349.56), a total of One Thousand Five Hundred Fourteen and 78/100 Dollars ($1,514.78), based on a measure of tax of Thirty-eight Thousand Eight Hundred Forty and 70/100 Dollars ($38,840.70) represent-
[fol. 7] ing sales of fuel oil to the New Zealand Government Stores Control Board on behalf of the New Zealand Division of the Royal Navy; and by Notice of Reassessment dated July 1, 1942 the said State Board of Equalization notified Plaintiff of such reassessment. That on July 7, 1942 Plaintiff paid under protest to the said Board of Equalization the sum of One Thousand Five Hundred Fourteen and 78/100 Dollars ($1,514.78) to cover payment of such reassessment of additional tax of One Thousand One Hundred Sixty-five and 22/100 Dollars ($1,165.22) plus Three Hundred Forty-nine and 56/100 ($349.56) interest thereon from July 15, 1937 to July 15, 1942, computed at the rate of six per cent (6%) per annum. That a true copy of said protest is attached hereto and marked Exhibit "A" and incorporated herein by reference.

That on the 5th day of September, 1942 and within the time provided in Section 23 of the California Retail Sales Tax Act, Plaintiff filed with the State Board of Equalization its claim for refund of said sum of One Thousand Five Hundred Fourteen and 78/100 Dollars ($1,514.78) and interest thereon. That a true copy of said claim for refund is attached hereto, marked Exhibit "B" and incorporated herein by reference.

That on September 16, 1942, the State Board of Equalization mailed to Plaintiff its notice that said claim for refund was denied by order of the State Board of Equalization on September 16, 1942. That Plaintiff, within the time prescribed by Section 31 of the California Retail Sales Tax Act, brings this action for recovery of said taxes and interest in
[fol. 8] the sum of One Thousand Five Hundred Fourteen and 78/100 Dollars ($1,514.78) so levied and assessed with respect to export sales of fuel oil to the New Zealand

Division of the Royal Navy, together with interest on such amount at the rate of six per cent (6%) per annum from date of payment thereof, to wit, July 7, 1942.

VI

That the amount sued for herein represents taxes and interest assessed and collected assertedly under the California Retail Sales Tax Act, as amended, with respect to an export sale in foreign commerce of Forty-three Thousand Seven Hundred Fifty-six and 85/100 (43,756.85) barrels of fuel oil to the New Zealand Government Stores Control Board acting on behalf of the New Zealand Division of the Royal Navy. That the "gross receipts" of the sale of said quantity of fuel oil was Thirty-eight Thousand Eight Hundred Forty and 70/100 Dollars ($38,840.70).

That the contract for sale of said quantity of fuel oil was entered into prior to March 12, 1937 by William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California, the predecessor in interest of Plaintiff as alleged in paragraph III hereinabove. That under date of December 3, 1936, the New Zealand Government Stores Control Board issued in New Zealand a written invitation for tenders for the supplying of a cargo of fuel oil required by the New Zealand Division of the Royal Navy, which invitation specified that the delivery of such fuel oil be "f. o. b. New Zealand Government tank steamer at any [fol. 9] port beyond New Zealand specified by the tenderer." That Hodder & Tolley, Ltd., a corporation, whose offices were and are in Palmerston North, New Zealand, had for approximately eight (8) years acted as agent in New Zealand for the said William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California (and for his respective predecessors, Richfield Oil Company of California and William C. McDuffie as Receiver in Equity for Richfield Oil Company of California) in the negotiation for sales in New Zealand of fuel oil distributed by the said William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California and his said respective predecessors. That such invitation by the New Zealand Government Stores Control Board for tenders was received in New Zealand by Hodder & Tolley, Ltd. and was forwarded on December 4, 1936 to William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California by

said agent, Hodder & Tolley, Ltd., with the latter's request for instructions and quotations. That thereafter William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California cabled to Hodder & Tolley, Ltd. in New Zealand the said Trustee's instructions and quotations for such tender, which instructions specified that the price quoted was f. o. b. ship's rail of buyer's tanker at the Richfield Marine Terminal at Long Beach, California. That Hodder & Tolley, Ltd., acting as agent as aforesaid, conducted in New Zealand negotiations with respect to such sale with the New Zealand Government [fol. 10] Stores Control Board on behalf of the said William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California.

That the said tender of William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California was thereafter accepted by the New Zealand Government Stores Control Board. That thereafter a written agreement for the sale of fuel oil dated February 4, 1937 was entered into in New Zealand between the New Zealand Government Stores Control Board and Hodder & Tolley, Ltd. as agent for and on behalf of the said William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California. That said written agreement dated February 4, 1937 provided for the supplying of fuel oil by the said William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California to the New Zealand Division of the Royal Navy and provided that the price of such fuel oil designated in said agreement was f. o. b. Los Angeles and provided further that delivery was to be made into New Zealand Naval tank steamer R. F. A. "Nucula" at Los Angeles, California. That said written agreement also provided that bills of lading and other customary shipping documents were to be handed to the Master of the "Nucula" and that the fuel oil was to be consigned to the Naval Officer In Charge, Auckland, New Zealand.

That said written agreement dated February 4, 1937 with the New Zealand Government Stores Control Board was one of the obligations of William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California which was assumed by Richfield Oil Corporation, [fol. 11] Plaintiff herein, in connection with the transfer of properties, property rights and assets on March 12, 1937

in pursuance of the reorganization proceedings under Section 77B of the National Bankruptcy Act described in paragraph III hereinabove; and that Plaintiff, Richfield Oil Corporation, performed the duties, liabilities and obligations of William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California as seller under said written agreement dated February 4, 1937 with the New Zealand Government Stores Control Board. That subsequent to March 12, 1937 the said Hodder & Tolley, Ltd. continued to act as agent for Plaintiff, Richfield Oil Corporation, in connection with the performance of said written agreement dated February 4, 1937.

That on May 14, 1937, Plaintiff delivered at its Long Beach California Marine Terminal into the New Zealand Naval tank steamer R. F. A. "Nucula" Forty-three Thousand Seven Hundred Fifty-six and 85/100 (43,756.85) barrels of fuel oil in bulk. That at the time of said delivery, a bill of lading dated May 14, 1937 was executed by the Master of the R. F. A. "Nucula," which bill of lading designated the Plaintiff, Richfield Oil Corporation, as shipper and provided that said quantity of Forty-three Thousand Seven Hundred Fifty-six and 85/100 (43,756.85) barrels of fuel oil was to be delivered to the Naval Officer In Charge, Auckland, New Zealand, at the Port of Auckland, New Zealand. That in connection with said delivery, Plaintiff executed and duly and regularly filed in the office [fol. 12] of the United States Collector of Customs at the Port of Los Angeles, California, on Customs Form 7525 a "Shipper's Export Declaration" describing said quantity of fuel oil and declaring the shipment thereof from Long Beach, California to Auckland, New Zealand. That in connection with said delivery, Plaintiff delivered to the Master of the R. F. A. "Nucula" the customary shipping documents consisting of copies of the run ticket, the inspector's certificate and the bill of lading.

That thereafter Plaintiff, Richfield Oil Corporation, received payment from the New Zealand Government Stores Control Board, Wellington, New Zealand, of the sum of Thirty-eight Thousand Eight Hundred Eighty-four and 70/100 Dollars ($38,884.70) representing the contract price of said fuel oil so sold and delivered, which payment was made pursuant to Plaintiff's invoice to the said New Zealand Government Stores Control Board. That Plain-

tiff has not at any time collected or invoiced or attempted to collect from the purchaser of said fuel oil the amount of the California Retail Sales Tax or any portion thereof. That thereafter and on or about June 21, 1937, Plaintiff paid to its agent, Hodder & Tolley, Ltd., a commission of 10¢ per ton of fuel oil so sold and delivered to the New Zealand Government Stores Control Board in pursuance of said written agreement described hereinabove, which commission was paid as compensation for the services performed in New Zealand in connection with the above described transaction by Hodder & Tolley, Ltd. as agent for Plaintiff and its predecessor William C. McDuffie as Re- [fol. 13] organization Trustee of Richfield Oil Company of California.

That the fuel oil so sold and delivered, as hereinabove alleged, was manufactured by Plaintiff and its predecessor William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California at the Richfield Refinery at Watson, California, from crude oil produced in the State of California. That there is not now nor at any of the times herein mentioned has there been oil produced in New Zealand or fuel oil manufactured in New Zealand in quantities sufficient to supply the requirements of the New Zealand Government Stores Control Board or of the New Zealand Division of the Royal Navy.

That the entire quantity of fuel oil, to wit, Forty-three Thousand Seven Hundred Fifty-six and 85/100 (43,756.85) barrels so sold and delivered by Plaintiff into the said tanker, R. F. A. "Nucula" was exported to and delivered to the New Zealand Division of the Royal Navy at Auckland, New Zealand, a Dominion of the British Empire, and that no portion thereof was delivered to or unloaded at ports of the United States of America and that no portion thereof was used or consumed by the purchaser thereof within the State of California or was used or consumed by the purchaser thereof during the transportation thereof to New Zealand.

VII

That at all times herein mentioned, it was the intention of all parties to the above described transaction, to wit, William C. McDuffie, as Reorganization Trustee of Richfield Oil Company of California, Plaintiff Richfield Oil [fol. 14] Corporation, Hodder & Tolley, Ltd., the New

Zealand Government Stores Control Board and the New Zealand Division of the Royal Navy that all of the acts and matters alleged in paragraph VI hereinabove, including (1) the issuance by the New Zealand Government Stores Control Board of a written invitation for tenders for the supplying of fuel oil; (2) the communications between Hodder & Tolley, Ltd. and William C. McDuffie, as Reorganization Trustee of Richfield Oil Company of California, relating to the Trustee's instructions and quotations for such tender; (3) the negotiations in New Zealand between the New Zealand Government Stores Control Board and Hodder & Tolley, Ltd. acting as agent for said Trustee as aforesaid; (4) the acceptance by the New Zealand Government Stores Control Board of the tender of the said Trustee; (5) the entering into in New Zealand of the written contract for sale of fuel oil dated February 4, 1937; (6) the delivery of said fuel oil by Plaintiff into the New Zealand Naval tank steamer R. F. A. "Nucula" at Plaintiff's marine terminal at Long Beach, California, together with the execution and delivery of the shipping documents described in paragraph VI hereinabove; (7) the transportation and delivery of the entire quantity of said fuel oil to the Port of Auckland, New Zealand; (8) payment to Plaintiff by the New Zealand Government Stores Control Board of the sales price of said fuel oil; and (9) payment by Plaintiff to Hodder & Tolley, Ltd. of the latter's commission, should constitute a single transaction. That at all times herein mentioned, it was the intention of all parties to [fol. 15] the above described transaction, to wit, William C. McDuffie, as Reorganization Trustee of Richfield Oil Company of California, Plaintiff Richfield Oil Corporation, Hodder & Tolley, Ltd., the New Zealand Government Stores Control Board and the New Zealand Division of the Royal Navy, that said full quantity of fuel oil be exported from California to New Zealand, a Dominion of the British Empire, without any interruption in the course of transportation and delivery thereof to the Port of Auckland, New Zealand.

VIII

That said taxes and interest thereon described in paragraph V hereinabove were erroneously and illegally collected. That said taxes and interest thereon were erroneously and illegally computed. That said taxes and interest

thereon are illegal for all of the reasons set forth in the Claim for Refund, a copy of which is attached hereto and marked Exhibit "B". That said sale of fuel oil was not taxable for all of the reasons set forth in said Claim for Refund attached hereto and marked Exhibit "B".

That said sale of fuel oil was and is exempt from tax pursuant to the provisions of Section 5 (a) of the California Retail Sales Tax Act, as amended. That the taxation by the State of California of such sale in export and foreign commerce was and is prohibited under the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States of America.

[fol. 16] IX

That if the California Retail Sales Tax Act, as amended, be construed, applied or enforced in such manner to impose said tax upon said sale of fuel oil hereinabove described, the said California Retail Sales Tax Act is invalid, illegal and unenforceable and contrary to and in violation of the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States of America.

X

That Defendant is indebted to Plaintiff in the sum of One Thousand Five Hundred Fourteen and 78/100 Dollars ($1,514.78) with interest thereon at the lawful rate from and after date of payment thereof on or about July 7, 1942 for money had and received by Defendant within two years last past for the use and benefit of Plaintiff, and that no part thereof has been paid Plaintiff.

Wherefore, Plaintiff prays for judgment against Defendant for the sum of One Thousand Five Hundred Fourteen and 78/100 Dollars ($1,514.78), together with interest thereon at the lawful rate from and after date of payment, to wit, on or about July 7, 1942; that Plaintiff have and recover from Defendant its costs and disbursements incurred and for such further relief as may be just and proper in the premises.

Dated: Los Angeles, California, December 8, 1942.

Robert E. Paradise, Attorney for Plaintiff.

* * * * * * *

[fol. 17] *Duly sworn to by W. T. Autrey. Jurat omitted in printing.*

EXHIBIT "A" TO COMPLAINT—July 6, 1942

State Board of Equalization
Sales Tax Division
Sacramento, California

Gentlemen:

Permit No. X-2535, District AA

Taxable Period April 1, 1937 to March 31, 1940

[fol. 18] Pursuant to your enclosed Notice of Reassessment dated July 1, 1942, there is enclosed our check made payable to your order in the sum of $1,514.78 representing additional retail sales tax for the above period in the sum of $1,165.22 plus $349.56 interest thereon to July 15, 1942.

Payment of this additional tax and interest is not intended as an admission of liability for any part of such sum as the payment is being made herewith under protest and under threat of penalties, suits, seizure of property and loss of license to transact business. It is our intention to file claims for refund of such tax and interest.

The Notice of Reassessment covers tax on an export sale of petroleum products to the New Zealand Division of the Royal Navy, as fully set forth in our Petition for Reassessment, Issue I, dated October 22, 1940, which petition has now been denied as to this particular transaction by your Notice of Reassessment dated July 1, 1942. The sale price of the products so sold in foreign commerce was $38,840.70 and said sales were and are exempt from tax under the provisions of Section V of the California Retail Sales Tax Act and taxation thereof by the State of California is prohibited under the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States.

We hereby reserve the right to file claim for refund of this illegal, erroneous and unconstitutional assessment and, if necessary, to institute and prosecute action for recovery [fol. 19] thereof together with interest thereon as provided by law.

Respectfully, Richfield Oil Corporation, by W. T. Autrey, Comptroller.

EXHIBIT "B" TO COMPLAINT

State of California

Before the State Board of Equalization

Claim for Refund by Richfield Oil Corporation for Overpayment of Retail Sales Tax

Permit No. X-2535, District AA

Period April 1, 1937 to March 31, 1940

Amount of claim: $1,514.78 and interest.

To the State Board of Equalization,
State of California:

Richfield Oil Corporation, hereinafter referred to as "taxpayer", hereby makes claim for refund of sales tax and interest thereon erroneously and illegally collected from it in the sum of $1,514.78 together with interest thereon from date of payment, on or about July 7, 1942, and for grounds for this claim states as follows:

The State Board of Equalization, hereinafter referred to as "Board", issued Notice of Assessment, Retail Sales Tax, [fol. 20] in the total sum of $354,096.73 against the taxpayer for the period April 1, 1937 to March 31, 1940, under date of September 25, 1940, and the taxpayer, under date of October 22, 1940, forwarded to the Board a Petition for Re-assessment of which issue I included protest against the Board's action in including in the measure of the additional tax assessment an amount of $38,840.70 representing an export sale to New Zealand of Petroleum products during the quarterly tax period April 1, 1937 to June 30, 1937. The additional tax assessed thereon at the rate of 3% amounts to $1,165.22. The Board by Notice of Reassessment dated July 1, 1942 notified the taxpayer that on May 7, 1942 it had reassessed tax of $1,165.22 and interest thereon to July 15, 1942 in the amount of $349.56, a total of $1,514.78, based on a measure of tax of $38,840.70 representing sales to the New Zealand Government Stores Control Board on behalf of the New Zealand Division of the Royal Navy, on the ground that review of the assessment disclosed no cause for adjustment of tax on such sales. Under date of July 6, 1942 the taxpayer forwarded to the Board with a letter of protest its check made payable to the order of the Board

in the total sum of $1,514.78 to cover payment of such reassessment of additional tax of $1,165.22 plus $349.56 interest thereon from July 15, 1937 to July 15, 1942, computed at the rate of 6% per annum.

The amount so paid represents tax and interest on account of an export sale in foreign commerce to the New Zealand Government Stores Control Board acting on behalf of the [fol. 21] New Zealand Division of the Royal Navy. The sale in question consisted of tangible personal property, to wit, 43,756.85 barrels of fuel oil; and the taxpayer is informed and believes and therefore states that as a part of the sales transaction such entire quantity of fuel oil was exported to New Zealand and that no part of such fuel oil was used or consumed by the purchaser within the State of California or was used or consumed by the purchaser during the transportation thereof to New Zealand.

The contract for supply of this fuel oil was made originally, prior to March 12, 1937, by William C. McDuffie, Reorganization Trustee of Richfield Oil Company of California, and in order to simplify the statement of facts to be recited hereinafter it will be explained why such contract was eventually fulfilled, after March 12, 1937, by this taxpayer (Richfield Oil Corporation). In pursuance of a Plan of Reorganization confirmed by the United States District Court, for the Southern District of California, Central Division, in proceedings, under Section 77-B of the National Bankruptcy Act, for the reorganization of Richfield Oil Company of California, the taxpayer claimant herein (Richfield Oil Corporation) acquired all of the business, properties and assets of Richfield Oil Company of California and of William C. McDuffie, as Reorganization Trustee of Richfield Oil Company of California, as of the close of business on March 12, 1937. As a part of said transfer the taxpayer claimant herein assumed all of the debts, liabilities [fol. 22] and obligations of William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California. Richfield Oil Company of California and William C. McDuffie, Reorganization Trustee of Richfield Oil Company of California will be referred to hereinafter as "Richfield" except where such word appears in the full name "Richfield Oil Corporation" in which case reference is being made to the taxpayer claimant herein.

Under date of December 3, 1936 the Secretary of the New Zealand Government Stores Control Board invited tenders

for the supply of a cargo of fuel oil required by the New Zealand Division of the Royal Navy. Such invitation for tenders was received in New Zealand by Richfield's agent, to wit, Hodder & Tolley, Ltd., Palmerston North, New Zealand, and was forwarded to Richfield on December 4, 1936 by Hodder & Tolley, Ltd. with the latter's request for instructions and quotations. Richfield thereafter cabled to Hodder & Tolley, Ltd. Richfield's instructions and quotations for such tenders and Hodder & Tolley, Ltd., acting as agent for Richfield, conducted negotiations with the New Zealand Government Stores Control Board.

Richfield's tender was thereafter accepted by the New Zealand Government Stores Control Board and thereafter a written agreement for the sale of fuel oil, dated February 4, 1937, was entered into between the New Zealand Government Stores Control Board and by Hodder & Tolley, Ltd. as agent for Richfield, such written agreement providing for the supply of fuel oil to the New Zealand Division of the [fol. 23] Royal Navy to be delivered at a designated price f.o.b. Los Angeles to the order of the Naval Secretary, Navy Office, Wellington, into New Zealand Naval tank steamer R. F. A. "Nucula" at Los Angeles, California. The agreement also provided that Bills of Lading and other customary shipping documents shall be handed to the Master of the "Nucula" and the oil consigned to the Naval-Officer-In-Charge, Auckland, New Zealand. Under date of February 5, 1937 Hodder & Tolley, Ltd. forwarded to Richfield a copy of such written agreement.

Pursuant to such written agreement dated February 4, 1937, the taxpayer on May 14, 1937 loaded at its Long Beach, California, terminal into the New Zealand Naval tank steamer R. F. A. "Nucula" 43,756.85 barrels of fuel oil in bulk to be delivered to the Naval Officer in Charge at the Port of Auckland, New Zealand, as evidenced by copy of Bill of Lading dated May 14, 1937, signed by Geo. Atwood, Master of the R. F. A. "Nucula" and now in taxpayer's possession. Such fuel oil was thereafter duly exported on May 15, 1937 from Long Beach, California, to Auckland, New Zealand, as evidenced by United States Customs Service Form 7527, Shipper's Export Declaration, a copy of which the Taxpayer has in its possession.

Thereafter, by invoice No. GX 5-11, the taxpayer billed the New Zealand Government Stores Control Board, Wellington, New Zealand, for the contract price of the fuel oil

in the amount of $38,840.70, plus $128.40 for inspection charge by Chas. Martin & Co. and plus $1,200.00 for cash [fol. 24] advanced by the taxpayer to Geo. Atwood, Master of the R. F. A. "Nucula." Neither at that time nor at any time since has the taxpayer invoiced or attempted to collect or collected from the purchaser any California retail sales tax whatsoever.

On or about June 21, 1937 taxpayer paid to its agent, Hodder & Tolley, Ltd., a commission of Ten Cents (10¢) per ton of fuel oil sold and delivered to the New Zealand Government Stores Control Board in pursuance of said written agreement referred to above, which commission was paid as compensation for the services of Hodder & Tolley, Ltd. in connection with the above described transaction. Such services were performed by Hodder & Tolley, Ltd. in New Zealand as agent for and on behalf of Richfield and taxpayer.

It was the intention of all parties to this transaction, to wit, Richfield; the taxpayer claimant; Hodder & Tolley, Ltd.; the New Zealand Government Stores Control Board; and the New Zealand Division of the Royal Navy, that the full quantity of fuel oil be exported to New Zealand without any interruption in the course of transportation and delivery thereof to the Port of Auckland, New Zealand. The taxpayer is informed and believes and therefore states that the entire quantity of fuel oil in question, referred to in the Notice of Assessment dated September 25, 1940 and in the Notice of Reassessment dated July 1, 1942, was delivered into said vessel by the taxpayer and was exported to and delivered to the New Zealand Division of the Royal Navy and that no portion thereof was delivered to or unloaded at ports of the United States of America and that [fol. 25] no portion thereof was used or consumed by the purchaser within the State of California or was used or consumed by the purchaser during the transportation thereof to New Zealand.

The taxpayer asserts that the transaction in question did not constitute a local sale subject to the tax imposed by the California Retail Sales Tax Act of 1933, as amended, but represented a sale and delivery in export and foreign commerce.

The sale price of the fuel oil so sold and delivered in export and foreign commerce was $38,840.70 and the California retail sales tax heretofore assessed and collected thereon by the State Board of Equalization is $1,165.22.

Said tax was erroneously and illegally computed, assessed, reassessed and collected by the said State Board of Equalization (1) because the said sale of fuel oil was and is exempt from tax pursuant to the provisions of Section 5(a) of the California Retail Sales Tax Act of 1933, as amended, and (2) because taxation by the State of California of such sale and delivery in export and foreign commerce was and is prohibited under the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2, of the Constitution of the United States of America. If the California Retail Sales Tax Act of 1933, as amended, be construed, applied or enforced in such manner to impose said tax upon the sale of fuel oil, the said California Retail Sales Tax Act is invalid, illegal and unenforceable and contrary to [fol. 26] and in violation of the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States of America.

Wherefore, by reason of the foregoing facts and assertions, the taxpayer hereby makes claim for refund to it of said tax and interest so paid by it and wrongfully and unlawfully collected from it, in the amount of $1,165.22 tax and interest of $349.56 thereon to July 15, 1942, total $1,514.78, together with interest on such total amount at the rate of 6% per annum from date of payment thereof, on or about July 7, 1942, until paid or credited to the said taxpayer.

Richfield Oil Corporation, by W. T. Autrey, Comptroller.

STATE OF CALIFORNIA,
County of Los Angeles, ss.:

W. T. Autrey being duly sworn, deposes and says that he is Comptroller for the taxpayer making the foregoing claim; that he has read the same and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated on information and belief and as to such matters he believes it to be true.

W. T. Autrey.

[fol. 27] Subscribed and sworn to before me this 5th day of September, 1942. Remy C. Seat, Notary Public in and for said County and State. My Commission expires January 20, 1946. (Seal.)

[File endorsement omitted.]

IN SUPERIOR COURT OF SACRAMENTO COUNTY

ANSWER—Filed January 5, 1943

Comes now defendant, State Board of Equalization, and by way of answer to plaintiff's complaint, admits, denies and alleges as follows:

I

Admits the allegations contained in Paragraphs I, II, III and IV of said complaint.

II

Answering the allegations of Paragraph V of said complaint, defendant denies that the gross receipts in the sum of $38,840.70, referred to in said Paragraph V, represented the gross receipts of an export sale to New Zealand. Defendant further denies that the taxes and interest in the sum of $1514.78, referred to in said Paragraph V, were [fol. 28] levied and assessed with respect to export sales of fuel oil and in that regard defendant specifically alleges that the fuel oil sold to the New Zealand Navy was delivered to the purchaser in the State of California and that said sale was a completed sale in the State of California and that the gross receipts from said sale were gross receipts received from the sale of tangible personal property at retail in the State of California. Defendant admits the remaining allegations of said Paragraph V, save and except that defendant denies generally and specifically each and every allegation or ground of protest contained in Exhibit A and incorporated in said Paragraph V by reference, and denies generally and specifically each and every ground or allegation for refund contained in Exhibit B, incorporated in said Paragraph V by reference.

III

Answering Paragraph VI of said complaint, defendant admits the allegations contained therein, save and except that defendant denies that the taxes and interest assessed and collected were assessed with respect to an export sale in foreign commerce. In that respect, defendant alleges that said taxes assessed were measured by the gross receipts of a sale of tangible personal property at retail in the State of California.

IV

Defendant denies generally and specifically each and every allegation contained in Paragraph VII of said complaint.

[fol. 29]

V

Defendant denies generally and specifically each and every allegation contained in Paragraphs VIII, IX and X of said complaint.

Wherefore, defendant prays that plaintiff take nothing by its complaint filed herein and that defendant have judgment for its costs of court and for such other and further relief as to this court may seem meet and just in the premises.

Dated: January 4, 1943.

Robert W. Kenny, Attorney General; H. H. Linney, Assistant Attorney General; Adrian A. Kragen, Deputy Attorney General, Attorneys for Defendant.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action;

Robert E. Paradise, Esq., the attorney of record of the above-named Plaintiff maintains an office at 555 South Flower Street, in Los Angeles, County of Los Angeles, State of California; and between said two places there is a regu-
[fol. 30] lar communication by mail; on the 4th day of January, 1943, I served a true copy of the Answer herein, to the original of which this affidavit is attached, on said last-named attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said

attorney at the office thereof, and prepaying the postage thereon.

Janet Gardner.

Subscribed and sworn to before me, this 4th day of January, 1943. Adrian A. Kragen, Deputy Attorney General.

[File endorsement omitted.]

IN SUPERIOR COURT OF SACRAMENTO COUNTY

STIPULATION AS TO CERTAIN FACTS—Filed March 8, 1943

It Is Stipulated:

(1) That Exhibit "A" attached hereto is a true and correct copy of the request of the New Zealand Government Stores Control Board, hereinafter for brevity referred to as "Control Board," referred to in Paragraph VI of the complaint.

Exhibit "B" is a true and correct copy of the written contract alleged in said Paragraph VI of the said complaint to have been entered into on the 4th day of February, 1937, [fol. 31] for the sale of said fuel oil, except that the pencilled figures and check-marks appearing upon the second page of specifications are not part of the said contract, but were added to the copy of the said agreement in possession of the plaintiff herein from which the said photostatic copy was taken.

Exhibit "C" is a true and correct copy of the export declaration referred to in said Paragraph VI of the complaint, and

Exhibit "D" is a true and correct copy of the bill of lading executed by the Master of the R. F. A. "Nucula" referred to in Paragraph VI of said complaint.

(2) That payment for the said fuel oil was made by the said Control Board in London, Kingdom of Great Britain, to the duly authorized agent of the plaintiff herein.

(3) It Is Further Stipulated that after the submission by Hodder & Tolley, Ltd., as agent for Wm. C. McDuffie, acting as Reorganization Trustee of Richfield Oil Company

of California, of the bid of said Wm. C. McDuffie, as said Reorganization Trustee, the said Control Board requested Hodder & Tolley, Ltd., to ascertain if the bid could be understood as submitted for one or two cargoes of oil at the option of the said Control Board, and said Wm. C. McDuffie, acting as said Reorganization Trustee of Richfield Oil Company of California, by cable authorized said Hodder & Tolley, Ltd., to advise the said said Control Board that the said bid submitted could be accepted by said Control Board at its option for one or two cargoes of fuel oil of approximately 6500 tons each, and said Hodder & Tolley, [fol. 32] Ltd., did so notify the said Control Board; that thereafter, the said Control Board elected to accept the said bid for two cargoes of fuel oil, and as alleged in Paragraph VI of said complaint, executed and delivered to Hodder & Tolley, Ltd., as agent of Wm. C. McDuffie, acting as Reorganization Trustee of Richfield Oil Company of California, the written contract or agreement, a copy of which is attached hereto as aforesaid as Exhibit "B" to the complaint, and it is further stipulated that upon receipt at Palmerston, New Zealand by Hodder & Tolley, Ltd. of the said contract or agreement, the said Hodder & Tolley, Ltd., as agent in New Zealand for said Wm. C. McDuffie, acting as Reorganization Trustee of Richfield Oil Company of California, executed a duplicate copy of said contract or agreement and delivered the same to said Control Board at Wellington, New Zealand.

(4) It Is Further Stipulated and Agreed that the first cargo of fuel oil was delivered by plaintiff to the R. F. A. "Nucula" on or about the 15th day of March, 1937, at the Marine Terminal, Long Beach, California, and transported by "Nucula" to Auckland, New Zealand, and that the second cargo, on which the said tax sought to be recovered in this action was levied, was delivered to the said R. F. A. "Nucula" by plaintiff on or about the 14th day of May, 1937, as alleged in Paragraph VI of said complaint. That said first shipment was handled and payment made for it in substantially the same manner as alleged in Paragraph VI of said complaint with reference to the said second ship- [fol. 33] ment. Payment for first shipment was made to Plaintiff's agent in London.

(5) It Is Further Stipulated, subject to the competency, relevancy and materiality of the facts herein stipulated to,

that if the plaintiff were to produce as witnesses the said Wm. C. McDuffie, and the proper servants, agents, officers and employees of Wm. C. McDuffie, acting as Reorganization Trustee of Richfield Oil Company of California, of Hodder & Tolley, Ltd., of the plaintiff Richfield Oil Corporation, of the said Control Board and of the New Zealand Division of the Royal Navy, that each of said witnesses would testify to the truth of the facts alleged in Paragraph VII hereon.

The defendant, while stipulating that said witnesses, if called, would so testify, does not believe that such testimony would be competent, relevant or material, and specifically reserves the right to object to the introduction of Paragraph (5) on the ground that the facts to which it is stipulated the witnesses would testify are not competent, relevant or material; and it is specifically agreed that the defendant shall have the same right to so object to the introduction of said paragraph (5) as it would if any of the said witnesses were personally present and testifying on the stand.

Dated: March 5th, 1943.

Robert E. Paradise, Norman S. Sterry, Gibson, Dunn & Crutcher, by Norman S. Sterry, Attorneys for [fol. 34] Plaintiff. Robert W. Kenny, Attorney General; H. H. Linney, Assistant Attorney General; Adrian A. Kragen, Deputy Attorney General; by Adrian A. Kragen, Attorneys for Defendant.

EXHIBIT "A" (PLAINTIFF'S EXHIBIT NO. 1)

Richfield Oil Co. Received Dec. 28, 1936. B. D. Blanchard.

New Zealand Government Stores Control Board

Tender Schedule No. 28—Oil Fuel for N. Z. Division of the Royal Navy

Tenders are invited for the supply of one cargo of 6,500 tons (approx.) of oil fuel required by the New Zealand Division of the Royal Navy for delivery f. o. b. N. Z. Government tank steamer at any port beyond New Zealand specified by

the tenderer. Delivery to be taken about the middle of March, 1937.

Alternative tenders are required for payment as under:

(1) Net cash, Wellington, New Zealand.

(2) Net cash, London, England.

[fol. 35] Conditions of Tender:

1. Tenders must be in writing and must be enclosed in a sealed envelope, marked on the outside "Tender for Fuel Oil", and must reach the Secretary, New Zealand Government Stores Control Board, Wellington, not later than 4 p. m. on Tuesday, 12th January, 1937.

Tenders must hold good for 30 days.

2. The oil fuel must be in accordance with Specification S. C. B. 28/1 attached.

3. Tenderers must state the specific gravity of the oil offered.

4. No advertisement relative to the acceptance of this tender shall be published in any newspaper, journal or other advertising medium unless such advertisement has first been submitted to and approved by the New Zealand Government Stores Control Board.

5. The lowest or any tender will not necessarily be accepted.

P. Glenn, Secretary.

Wellington, 3rd December, 1936.

[fol. 36] EXHIBIT "B" (PLAINTIFF'S EXHIBIT No. 2)

S. C. B. 5/10/2

N. Z. Govt Stores Control Board,

Wellington, N. Z.

4th February, 1937.

"Richfield Oil Co. Received Mar. 15, 1937. B. D. Blanchard."

"Rec'd. Mar. 15, 1937. E. C. Hayes."

Messrs. Hodder & Tolley, Ltd., Box 136, Palmerston North.

GENTLEMEN:

I am directed to advise that your tender dated 13th January, 1937, is accepted for the supply of two cargoes each of 6500 tons (approx) of oil fuel to the New Zealand Division of the Royal Navy, subject to the following conditions—

(1) *Price* 24/8.4 per ton of 2240 lbs Fob Los Angeles, payment in London, with conversion at $4.90 to £. any variation at date of payment to be to the account of the Naval Department.

(2) *Payment* shall be made by the High Commissioner for New Zealand in London to the credit of the Richfield Oil Co., Los Angeles, at Barclay's Bank, Chief Foreign Branch, London.

(3) *Delivery* shall be given to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank steamer R. F. A. "Nucula" at Los Angeles, California. Delivery of the first cargo shall be given on or about the 15th March, 1937, and of the second cargo on or about the 21st May, 1937, or as at such other time as may be mutually agreed upon.

[fol. 37] (4) The oil supplied shall conform in all respects to the specification copy of which is attached. *Note:* It is particularly desired that the hard asphalt content be as low as possible and not more than 2%.

(5) The oil shall be inspected by Messrs. Charles Martin & Co. at a cost of two cents per ton.

(6) The Master of the "Nucula" shall wireless the Richfield Oil Co. when seven days and also when 24 hours out from Los Angeles.

(7) The Richfield Oil Co. shall advance to the Master of the "Nucula" at Los Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading on each trip, such advance to be repaid when payment is made for the fuel oil.

(8) Bills of lading and other customary shipping documents shall be handed to the Master of the "Nucula" and the oil consigned to the Naval-Officer-In-Charge, Auckland, New Zealand.

(9) Should there be any breach of these conditions on the part of the contractors or their authorized agents this agreement may be summarily determined by the Accounting Officer of the N. Z. Naval Tank Steamer present for the purpose of accepting delivery of the fuel oil at the port of delivery, giving notice in writing to that effect to the contractor's agents, or by the Naval Secretary at Wellington giving notice in a like manner to the contractors at [fol. 38] their registered office at Wellington, New Zealand.

(10) No advertisement relative to the contract shall be published in any newspaper, Magazine, journal or other advertising medium unless such advertisement has first been submitted to and approved by the Stores Control Board.

Please confirm by signing the attached duplicate of this agreement and returning to me at your earliest convenience.

Yours faithfully, —— ——, Secretary.

(Rec'd Mar. 15, 1937. E. C. Hayes.)

New Zealand Government Stores Control Board

Specification S. C. B. 28/1—Oil Fuel for the New Zealand Division of the Royal Navy

Flash Point: Not to be lower than 175° F. as obtained by the Pensky-Marten close test.

Sulphur: Not to exceed 1.5%.

Acidity: The oil fuel supplied shall be free from inorganic acidity and as free as possible from organic acidity.

[fol. 39] *Water:* Not to exceed 0.5%.

Viscosity: Not to exceed 1,000 seconds for an outflwo of 50 cubic centimetres at a temperature of 32° F., as determined by Redwood's Standard Viscometer No. 11 (Admiralty type for testing oil fuels).

Notwithstanding that the maximum viscosity allowed by the general specification is 1,000 seconds at 32° F. the actual warranty or condition of contract will be the figure guaranteed by the firm tendering.

Calorific Value: Not less than 18,400 B.T.U.'s per lb.

Specific Gravity: 0.89 to .946 at 60° F. (Approximately .94 preferred).

Impurities: The oil shall be free from earthy, carbonaceous or fibrous matter or other impurities which are likely to choke the burners.

Note: In the case of Persian Oil Fuel the viscosity is not to exceed 1000 seconds at 40° F. and a bottle test is to be carried out as follows—

About 200 mls. of the sample as received are filtered at laboratory temperature through 36 mesh wire gauze and placed in a pint bottle of 2¾ ins. internal diameter. The bottle is then carefully packed in melting ice in an ice chest in such a manner that the oil is maintained at 32° F. [fol. 40] for a period of at least 16 hours and not more than 24 hours. The bottle is then removed and gently inverted. If the oil is wholly or partially set, the bottle is shaken for not more than 5 seconds. The oil when subjected to the "Bottle" test must either—

(a) Flow as a uniform liquid or

(b) If partically or wholly set flow as a uniform liquid when shaken as above. The sulphur content is not to exceed 3%.

Wellington, 3rd December, 1936.

(Rec'd Mar. 15, 1937. E. C. Hayes.)

New Zealand Government Stores Control Board

Specification S. C. B. 28/1—Oil Fuel for the New Zealand Division of the Royal Navy

Flash Point: Not to be lower than 175° F. as obtained by the Pensky-Marten close test.

Sulphur: Not to exceed 1.5%.

Acidity: The oil fuel supplied shall be free from inorganic acidity and as free as possible from organic acidity.

Water: Not to exceed 0.5%. (Note: In pencil figures: "March, 1935 bid allowed 1.0%")

Viscosity: Not to exceed 1,000 seconds for an outflow of 50 cubic centimetres at a temperature of 32° F., as deter- [fol. 41] mined by Redwood's Standard Viscometer No. 11 (Admiralty type for testing oil fuels).

Notwithstanding that the maximum viscosity allowed by the general specification is 1,000 seconds at 32° F. the actual warranty or condition of contract will be the figure guaranteed by the firm tendering.

Calorific Value: Not less than 18,400 B. T. U.'s per lb.

Specific Gravity: 0.89 to .946 at 60° F. (approximately .94 preferred). (Note: Pencil figures: ("19 A. P. 1"))

Impurities: The oil shall be free from earthy, carbonaceous or fibrous matter or other impurities which are likely to choke the burners.

Note: In the case of Persian Oil Fuel the viscosity is not to exceed 1,000 seconds at 40° F. and a bottle test is to be carried out as follows:—

About 200 mls. of the sample as received are filtered at laboratory temperature through 36 mesh wire gauze and placed in a pint bottle of 2¾ ins. internal diameter. The bottle is then carefully packed in melting ice in an ice chest in such a manner that the oil is maintained at 32° F. for a period of at least 16 hours and not more than 24 hours. The bottle is then removed and gently inverted.
[fol. 42] If the oil is wholly or partially set, the bottle is shaken for not more than 5 seconds.

The oil when subjected to the 'Bottle' test must either—

(a) flow as a uniform liquid; or

(b) if partially or wholly set flow as a uniform liquid when shaken as above.

The sulphur content is not to exceed 3%.

Wellington, 3rd December, 1936.

(Here follow 2 photolithographs, side folios 43, 43a.)

EXHIBIT "C"

Customs Form 7525
U.S. DEPARTMENT OF THE TREASURY
File No.

UNITED STATES CUSTOMS SERVICE

☞ Read carefully the instructions on back to avoid delay at shipping point

SHIPPER'S EXPORT DECLARATION

OF SHIPMENTS TO FOREIGN COUNTRIES OR NONCONTIGUOUS TERRITORIES OF THE U.S.

☞ Clearance will not be granted until shipper's declaration has been filed with the Collector of Customs
(Declarations should be typewritten or prepared in ink. Pencil is not permissible.)

Customs File No.

Shipper's Code Nos.

Importer	Port
Plus	Country

Goods shipped by RICHFIELD OIL CORPORATION
(Name of actual shipper) – If shipped by AGENT, insert name and address of principal, seller, or consignor on second line below.

Address 555 South Flower Street, (Number) (Street) Los Angeles, (City) California (State)

Shipment invoiced by RICHFIELD OIL CORPORATION
(If shipped by AGENT, insert name and address of principal, seller, or consignor)

For shipment on the New Zealand Navy Tanker "Pueblo"
(Name of carrier. If vessel, give name and nationality)

From Long Beach, Calif. To *final* country of destination Auckland, (City) New Zealand (Country)
(U. S. Customs port of export) (Not country where transshipped)

Marks and numbers	Number and kind of packages	DESCRIPTION OF GOODS (Describe each kind of goods in detail. Do not use general terms such as "merchandise," "goods," "machinery," "parts," etc. (See instructions on back, par. 3)	Net quantity in pounds, long tons (of 2,240 pounds), gallons, yards, bushels, barrels, etc., as required by Schedule B	Value at Time and Place of Export		Statistical Class No., Schedule B
				U. S. Products, including foreign goods shipped or remanufactured in the United States	Foreign products in same condition as imported	
			Barrels	(Report whole dollars — no cents nor symbols)		
NIL	In Bulk	Fuel Oil	43,757	899,381		9033

Waybill or manifest No. _____ May 15, 1937 (Date of exportation) Total, $ 39,381

I authorize _____ to act as my agent

for customs purposes. _____, Shipper.

I declare that the above is a true account of merchandise shipped to the country named; and that the description and quantity of each article is truly stated at the selling price or market value at time and place of exportation.

Plaintiff's Exhibit No. 3

(Signature) B W Blanchard

Sworn and subscribed to before me

on _____, 193

(Capacity) Agent (Member of firm, secretary, agent, etc.)

(Address) 555 So. Flower St., Los Angeles, California

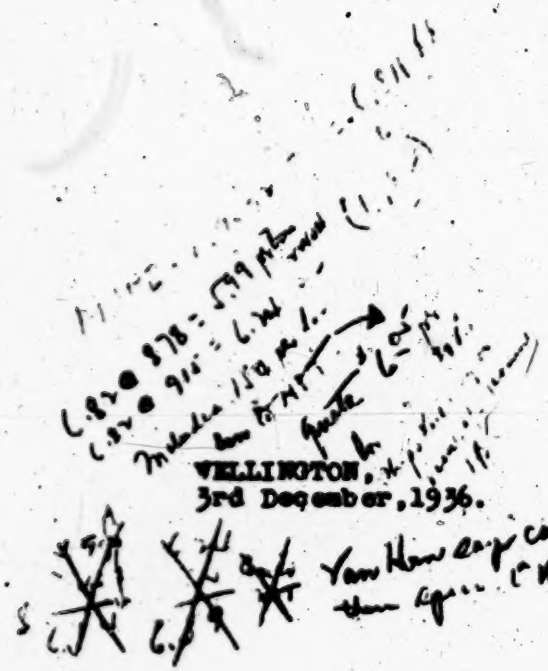
(Clerk, notary public, or other authorized person)

EXHIBIT "C"

EXHIBIT "B"

IMPURITIES:

A. **Note:** In



WELLINGTON,
3rd December, 1936.

EXHIBIT "B"

[fol. 44] EXHIBIT "D"

(Plaintiff's Exhibit No. 4.)

Non-Negotiable Copy

RICHFIELD OIL CORPORATION

555 South Flower Street

Los Angeles, Cal.

Shipped in apparent good order and condition by Richfield Oil Corporation on board the British Steamship called the R. F. A. Nucula whereof G. Atwood is master, now lying in the Port of Long Beach, California and bound for Auckland, New Zealand, to say 43,756.85 bbls., of 42 U. S. Measured Gallons; Fuel Oil in bulk @ 60° F., equivalent to 6,419.95 Long Tons of 2240 lbs. to be delivered at the Port of Auckland, New Zealand or so near thereto as she can safely get always afloat unto Naval Officer in Charge, Auckland, New Zealand or to his or their assigns, he or they paying freight at the rate of as agreed Contents, quality, weight and gauge unknown.

Not responsible for leakage or deterioration of quality.—General Average Payable according to York-Antwerp Rules of 1924, and as to matters not therein provided for, according to usages and customs of the port of San Francisco. In case a General Average Statement to be required, the same to be adjusted at San Francisco by adjusters to be appointed by the Owners, who are to attend to the settlement and collection of the average, subject to customary charges. Should the vessel put into a port of distress or be [fol. 45] under average, she is to be consigned to Owner's Agents, paying them the usual charges and commissions.

It is Mutually Agreed that the Ship shall have liberty to sail without pilots; to tow and assist vessels in all situations; to deviate for the purpose of saving life or property; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owner of the goods, and, in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tran-ship the goods to their destination by any other steamship.

It is also Mutually Agreed, that the Carrier shall not be liable for loss or damage occasioned by causes beyond his

control, by the perils of the sea or other waters, by fire from any cause wheresoever occurring; by barratry of the master or crew, by enemies, pirates, or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the pilot, master, marines, or other servants of the ship owner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them or by the Ship's Husband or Manager); nor for the heating, decay, putrefaction, rust, sweat, change of character, [illegible] leakage, breakage, or any loss or damage arising [illegible] nature [fol. 46] of the goods or the insufficiency [illegible] nor for land damage; nor for the obliteration [illegible] insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk, or transshipment; nor for any loss or damage caused by the prolongation of the voyage.

It is Mutually Agreed that if due diligence shall have been exercised to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster, resulting from accident, or faults or errors in navigation, or in the management of the vessel, or from any latent defect in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners, of the cargo shall, nevertheless, pay salvage and any special charges incurred in respect of the cargo, and shall contribute in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel, or any latent defect or unseaworthiness.

1. It is also Mutually Agreed that the Carrier shall not [fol. 47] be liable for Gold, Silver, Bullion, Specie, Documents, Jewelry, Pictures, Embroideries, Works of Art, Silks, Furs, China, Porcelain, Watches, Clocks or for goods of any description which are above the value of $500 per package, unless Bills of Lading are signed therefor, with the value therein expressed, and a special agreement is made.

2. Also, that shippers shall be liable for any loss or damage to ship or Cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such Shipper be Principal or Agent, and such goods may be thrown overboard or destroyed at any time without compensation.

3. Also, that the Carrier shall have a lien on the goods for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking of packages or description of their contents.

4. Also, that in case the ship shall be prevented from reaching her destination by Quarantine, the Carrier may discharge the goods into any Depot or Lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

5. Also, that if the goods be not taken by the consignee within such time as is provided by the regulation of the port of discharge, they may be stored, by the Carrier, at the expense and risk of their owners.

6. Also, that full freight is payable on damaged goods, [fol. 48] but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

7. Also, freight is to be considered as earned upon shipment and is to be retained by the ship owners, vessel or cargo lost or not lost.

8. Also, the owner shall have a lien on the cargo for all freight, hire, advances, charges, dead freight, demurrage, cost of recovering same, taxes, duties and fines, which may be incurred or sustained or be imposed upon it, and all expenses to owner resulting from any errors or omissions

of charterer. Dues and other charges upon the cargo shall be paid by charterer, and dues and other charges upon the vessel shall be paid by owner.

9. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the Carrier shall be entitled to recover the difference from the shipper.

10. Also, that in the event of claims for short delivery when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the Ship's entry at the Custom House, less all charges saved.

11. All conditions and exceptions contained in Charter Party dated ——— —, —— are hereby made a part of this bill of lading.

And Finally, in accepting this Bill of Lading, the Shipper, the Owner, and Consignee of the goods and the holder of [fol. 49] the Bill of Lading, agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such Shipper, Owner, Consignee or Holder.

In Witness Whereof, the Master or Agent of the said Ship hath affirmed to three Bills of Lading all of this tenor and date numbered consecutively, one of which being accomplished, the others to stand void.

It is also Mutually Agreed that shipment made hereunder is subject to all of the provisions of Sections 4281, 4282 and 4283 of the Revised Statutes of the United States and the amendments thereto, and of Section 3 of the Act of Congress of the United States, approved February 13, 1893, and entitled "An Act Relating to the Navigation of Vessels," etc.

Dated in Long Beach, Calif. this 14th day of May, 1937.

Geo. Atwood, Master.

[File endorsement omitted.]

[fol. 50] IN SUPERIOR COURT OF SACRAMENTO COUNTY

[Title omitted]

MINUTE ENTRY OF HEARING—March 17, 1943

The above entitled cause came on regularly for hearing before the Court this day with Norman S. Sterry of counsel for the Plaintiff and A. A. Kragen, of counsel for the Defendant, appearing in Court. Thereupon counsel informed the Court that the cause would be submitted on the briefs and stipulation of facts heretofore filed herein. Counsel thereupon argued the points to the Court and at the conclusion of the argument counsel for the plaintiff filed his "Opening Brief." Counsel for Defendant is granted 15 days in which to reply thereto. At this time Mr. Thomas O'Hara appeared on behalf of the Alien Property Custodian and request- permission to file Briefs as Amicus Curiæ. The request was granted.

[fol. 51] IN SUPERIOR COURT OF SACRAMENTO COUNTY

SUPPLEMENTAL STIPULATION OF FACTS—Filed March 17, 1943

Supplemental to the stipulation of March 5, 1943, it is further stipulated and agreed between the parties as follows:

(6) That plaintiff's refinery at Watson is located about midway between the City of Los Angeles and the Marine Terminal at Long Beach, California. At all times mentioned in the complaint the plaintiff and its predecessor in interest maintained storage tanks at said Marine Terminal, connected with the refinery tanks of plaintiff and its predecessor in interest at Watson by a pipe line.

(7) That at this time the plaintiff does not have any record of receiving any wireless message from the master of the "Nucula" on either voyage other than those required by the contract, i.e., a wireless message advising when the vessel was approximately seven days out from the Marine Terminal, and another when twenty-four hours out. It was customary, however, for tankers approaching a port after first wirelessing their position to keep the

shipper advised of their daily progress. As to each cargo, when the plaintiff was advised that the said "Nucula" was between twenty-four and forty-eight hours out from Marine Terminal, Long Beach, plaintiff started pumping oil from its refinery tanks at Watson to its storage tanks at said Marine Terminal and continued the pumping until the entire cargo had been pumped into the storage tanks. The said oil was pumped from the storage tanks into the [fol. 52] "Nucula" as soon as it had docked and was ready to receive the oil. There are no records available to show whether on either trip the "Nucula" was ready to receive the oil before the entire cargo had been pumped into the storage tanks, but the oil was not held in the tanks more than twenty-four to thirty-six hours before the plaintiff started pumping it from the storage tanks into the "Nucula". After the pumping of said oil from the storage tanks into the "Nucula" was started, it was continued without interruption until the entire cargo was delivered into the tanks of the "Nucula".

Dated: March 13, 1943.

Robert S. Paradise, Norman S. Sterry, Gibson, Dunn & Crutcher, By Norman S. Sterry, Attorneys for Plaintiff, Robert W. Kenny, Attorney General, H. H. Linney, Assistant Attorney General, Adrian A. Kragen, Deputy Attorney General, By Adrian A. Kragen, Attorneys for Defendant.

[File endorsement omitted].

IN SUPERIOR COURT OF SACRAMENTO COUNTY

OPINION OF THE COURT—Filed April 28, 1943

This is an action to recover a sum of money paid as a [fol. 53] sales tax assessed against the plaintiff upon a sale of oil to the New Zealand Government.

I will discuss the facts which have all been stipulated to as if they were herein set forth. The Plaintiff claims that this was an export sale exempted from tax or impost by the Constitution of the United States, Defendant contends that as the oil was delivered to the purchaser at the port of Long Beach, in California, that the sale was a local

sale, consu-mated in this State and subject to local law. Defendant takes the position also that a sales tax is one levied upon all sales transactions in California without discrimination that it is not the kind of tax or impost which the Constitution was meant to forbid.

Before entering upon a discussion of these questions it might be well to state some well settled principles which may govern their decision. In an early case it was stated that until goods in a state had actually begun to move in process of exportation that they must be regarded as not only in the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed in the State.

Coe vs. Errol 29 Law Ed. 715.

This exemption from constitutional protection, and statement of liability to taxation has never been more strongly [fols. 54-55] asserted or clearly defined. In view of the frequent claim that the recent cases have narrowed the protection given to interstate and export transactions, it is well to keep this fact in mind. In this same case it was stated when goods or a shipment took on the character of exports and became entitled to the protection of the Constitution, they become such "when actually started in the course of transportation to another state or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose in which they commence their final movement for transportation from the state of their origin to that of their destination."

Coe vs. Erroll 29 Law Ed. 715.

Again it may be said that this method of measurement has never been changed, nor has the character of goods as exports while actually in process of exportation and on their way from the point of origin to their destination in a foreign country ever been questioned. The third principle announced in that case was, and this was no novelty, that once the export shipment had started and while the goods

were in course of transportation they were "clearly" exempt from state taxation.

This principle too has never been contradicted; it cannot be if any meaning is to be given to the Constitution which says that no State shall, without the consent of Congress, lay any impost upon exports. Accepting these principles [fol. 56] as settled, the movement of the oil in this case, as an export, if it was an export, began when plaintiff began pumping into its receptacles at Long Beach in readiness to deliver it into the tanks of the Nucula, which had just notified it that it would be ready to receive the oil within a few hours. It therefore becomes necessary for plaintiff to show that by some process at the moment of the sale the character of the oil as export had ceased and that for an appreciable period it had become a part of the general property of the State. It is in this particular that the modern cases have shown a tendency to depart from the earlier decisions and to take a position more favorable to the taxing power of the State. They have not done this by modifying the conditions under which goods become exports, or changing the period at which they take on that character, or the rule that goods after they have become export in character cannot be taxed while in process of moving from their domestic origin to their foreign destination. What the later cases have done is to more carefully scrutinize an interstate transaction and to a lesser extent an export one to determine at what moment the shipment began and at what moment it ended, and to find if at any part of the journey and for any period of time the interstate or export movement had ceased, and to hold that up to the moment of the beginning of the shipment and at the moment it ceased or for the moment a shipment may have been interrupted, the goods become assessable for normal state taxation. This attitude of the modern cases followed the [fol. 57] great increase of trade and movement of goods, the various methods of their transport, the speed with which such transactions are now effected, and the vast increase in revenue now needed for state and national administration. A fine example of such modern decisions is Standard Oil Co. vs. Johnson 132 Pac 2nd, 910 and Chicago Bridge and Iron Works vs. Johnson, 19 Cal 2nd, 162; and cases cited therein. One of the most advaneed of these decisions is that of McGoldrick vs. White, etc. 84 Law Ed. 565 in which the Court go into detail in describing the con-

ditions under which taxes which may indirectly and incidentally affect interstate trade may legally be levied. Neither in the case itself nor in the incidents it referred to was it held that a tax could be imposed on goods while in the actual process of transport. The tax which is validated was a tax imposed after goods which had been in interstate transit had reached their destination. In cases with which it illustrated the correctness of its position the tax preceded the shipment. In the case before me defendant contends that whatever the contract of purchase and sale had been that the sale was completed when the oil was delivered on the vessel at Long Beach; that there plaintiff delivered the oil and the title passed to the purchaser in New Zealand, and that the sale having thus been consu-mated in California our sales tax properly applied to it. I don't think that this reasoning can be sustained in the circumstances of this case.

If the whole transaction as planned by the parties constituted an arrangement for an export which was finally [fol. 58] carried out, the fact of connecting carriers, intermediate deliveries, reshipments, successive bills of lading and consignors, have always been held to have been but steps in a steady movement of the goods which constitutes one export journey. Conclusive of this case and contrary to the contention of defendant is the case of A. G. Spaulding vs. Edwards, 67 Law Ed. 865. This case in all essential particulars is identical with the case before me. In the Spaulding case a firm in Venezuela desired to purchase in New York a bill of sporting goods and gave directions to a brokerage firm in New York to procure the goods and to arrange for their shipment to Venezuela. The brokers purchased the goods from the Spaulding Brothers giving them full shipping directions. These the Spauldings complied with, delivered the goods upon a carrier, properly labeled, and received a receipt from the carrier which they delivered to the brokers. The brokers accepted delivery of the goods, took out a bill of lading, in their own name and paid to the Spaulding Brothers the purchase price of the goods. It was conceded by the court that thereupon the title to the goods shipped passed from the Spaulding Brothers. The Court in that case stated that in view of the fact that the Spauldings had made delivery of the goods to the brokers and had passed title to them, the question was, was the sale by them a separate independent local sale, or a step

in exportation. It was definitely held to have been the latter and a part of the exportation.

Using language directly applicable to the case before us [fol. 59] the Court said speaking through Mr. Justice Holmes, that "no one would doubt that they (the sporting goods) were exempt after they had been loaded upon the vessel for Venezuela, and the bill of lading issued. ——. The very act that passed the title and that would [illegible] incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port".

Delivery to an intermediary who is collecting goods for export does not deprive the goods of their character as export goods where they are later exported in pursuance of a previous plan to that effect. In the case of Southern Pacific Terminal Co. vs. Interstate Commerce Commission, 55 Law Ed. 310, one Young was "a merchant and manufacturer engaged in buying, selling and converting cotton seed cake for his own account." His business consisted "in buying cotton seed cake in the interior shipping it to himself by carloads at pier "C", there grinding it into meal, sacking it and loading it into steamships berthed at pier "C" for export." The Court held that the purchase of the cake by Young, its shipment to him in his own name and its concentration on the wharf, were "but incidents under the circumstances presented by the record in the transshipment of the products in export trade." There was an intermediate delivery, or a succession of them in Texas, etc. Co. vs. Sabine Tram Co., 57 Law Ed. 442, but the court held [fol. 60] that such deliveries did not change the character of the transactions as an export shipment. Broken journeys, successive way bills or intermediate deliveries are not the tests by which the nature of a shipment is measured. It is its essential character which determines whether it is a local sale, an interstate transaction or an export shipment.

The delivery of oil to the Southern Pacific Co., in Standard Oil Co. vs. Johnson, 132 Pac. 2nd, 910, was under such circumstances that that company could have changed the destination of the shipment or to have retained it in California. In State vs. Blind Bull Coal Co., 101 Pac. 2nd 70, the coal was delivered to the purchasers to do with as they pleased. In Superior Oil Co. vs. Mississippi, 74 Law Ed.

504, the Court said of a sale which it held not to have been interstate: "But here the gasoline was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana, except its own wishes." Such a delivery deprives a shipment of any previously attempted interstate or export character. But where a delivery in course of an export shipment is made in aid of the shipment and under circumstances which insure the continuance of the journey and the delivery of the goods to their foreign destination, such a delivery is a mere step in the comprehensive purpose and continues the goods in their character of goods in process of exportation.

Counsel for defendant here admits that in the circumstances of this case "that plaintiff could actually export its [fol. 61] product without ever coming within the purview of this taxing statute. It could as consignor deliver to an exporting carrier oil consigned to New Zealand." This is almost identically what it did. All that is required of a ship in order that it preserve its character as export is that the consignment should be through some carrier which would insure the continuity of the export journey and delivery to the consignee at the port of destination. Could that be done more irrevocably than was done here? Here the oil was purchased by a foreign government for the use of its navy in New Zealand, the plaintiff consigned the oil to that government in New Zealand. Instead of employing another carrier the New Zealand government sent a vessel of its navy to Long Beach to receive the oil and to carry it to the destination to which it was consigned. In considering delivery in such cases the law is not concerned with the means of shipment. It is concerned solely with the question as to whether or not the means chosen guarantee the foreign delivery in good faith and according to the terms of a consignment to that destination. Can we say here that if plaintiff had delivered the oil to some form of public carrier, consigned to the New Zealand government, the sale would not have been local nor the tax have applied, but when it does exactly the same thing except that instead of using a public carrier it uses what should be a more dependible one in the shape of a naval vessel of the government which wanted the oil and sent the vessel here to take it to them, we should say that the sale was local and the [fol. 62] tax collectible? If we should refine in this way

we would find ourselves as was the State in Wisconsin vs. J. C. Penney Co., 85 Law Ed. 267, where if a tax was called by one name it would be unconstitutional while if called by another it would be valid. Should we not do as the Supreme Court did in that case and ask ourselves was the transaction in its entirety a sale for export; or did the New Zealand Government come here and make a local purchase of oil which it could thereafter do with as it saw fit, without any obligation to take the oil out of the State. It seems to me that the mere question of delivery is wholly indeterminative of the character of this transaction. The question is was this sale and purchase viewed in its entirety a sale and purchase for export and was the delivery of the oil on the naval vessel the end of the action, or was it a mere step in execution of a contract for export, a contract which was obviously intended as an export arrangement and one which was actually carried out.

The circumstances attending the sale, particularly the contract in pursuance of which the shipment is made is the determining factor.

The general intent of a manufacturer that an article is to be exported and his holding it for that purpose does not give to the article the protection of an export. Cornell vs. Coyle, 48 Law Edition 504: The owners state of mind in relation to the goods and his partial preparation to export them do not give such goods the protection of the Constitution. Coe vs. Errol, 29 Law Ed. 715. A bill of lading [fol. 63] does not control; the parties to a sale cannot "convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause" Superior Oil Co. vs. Mississippi, 74 Law Ed. 504: State Board of Equalization vs. Blind Bull Coal Co., 101 Pac. 2nd 70. Standard Oil Co. vs. Johnson, 57 A. C. A. 917-926. Unquestionably there can be a delivery preceding an export which concludes a sale and makes of it a local transaction. Countless cases may be cited to support this statement. Standard Oil Co. vs. Johnson, 132 Pac. 2nd 910, is a good example. But where there has been a *contract* of sale *for export* which comprehends an intermediate delivery, and where that delivery was part of the contract and in execution of it, it has always been held that the delivery, such as the one in this case, was merely a step in a completed export, the whole being within the protection of the Constitution. This is well ex-

pressed and illustrated by the case of Texas & N. O. R. Co. vs. Sabine Tram Co., 57 Law Ed. 442. In this case there was a shipment of lumber from an interior point in Texas to a Texas gulf port. It proceeded under a local bill of lading to a purchaser at the point of reshipment to a foreign port. On behalf of the party claiming the shipment to the gulf port to have been a local shipment in intrastate commerce, it was admitted "that there may be some additional or outside arrangement for a continuous final movement to a destination beyond that named in the bill of lading, or the bill of lading may itself note a forward continuous [fol. 64] movement beyond the destination named." It was insisted however that that movement must be unbroken under the original arrangement or shipment. They insisted that this could not be done where the original shipment was under a bill of lading consigning the lumber to a local purchaser at the port where the latter reshipped it to a European port; that the original shipper had no concern with what was done with the lumber after it reached the point to which he had billed it and where it was delivered to the person to whom he had sold it. The Court rejected this narrow contention, and measured the purchase and its transportation by all of the circumstances attending it, saying: "The determining circumstance is that the shipment of the lumber to Sabine (its first journey under a separate bill of lading) was but a step in its transportation to its real and ultimate destination in foreign countries. In other words the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial." Continuing the court say, which has special applicability to the case before us. "There must be transshipment at the seaboard; and if that may be the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character though it be essentially foreign." Texas vs. Sabine, 57 Law Ed. 442.

An illustrative case is Railroad Commission vs. Texas Ry. [fol. 65] Co., 57 Law Ed. 1215. There certain exporters in New Orleans made purchases of logs and staves in various sections of Louisiana. These were shipped to the purchaser, the shipments under the terms of the bills of lading, to terminate there. It was insisted by the appellant that,

to make the shipments exports, "there must be bills of lading and other means of connection between the railroads and the ocean carriers." But again the Court held that the circumstances of the sales determined their character. Stating that while the bills of lading provided for the delivery of the goods to the consignee at New Orleans, "the staves and logs were intended by the shippers to be exported to foreign countries, and were treated by both the shippers and the carriers accordingly." Citing cases, the court declared that in these cases there was a local shipment of freight which necessarily terminated at the seaboard. But it was decided that the character of the shipments and their continuity as a movement in foreign commerce did not terminate, nor was it affected by being tranported on local bills of lading. In the case before me there was no bill of lading but the defendant contends that there was a local transport through plaintiff's pipe line, which terminated at Long Beach with the delivery of the oil to the vessel Nucula. But as the case last cited states: "It was the essential character of the commerce, not the accident of local or through bills of lading which determines Federal or State control over it." Id. 57 Law Ed. 1215 p. 1219.

[fol. 66] In the often quoted case of Superior Oil Co. vs. Mississippi, 74 Law Ed. 504, where a sale was held to have been local it was stated that if there had been a certain agreement constituting the transaction interstate, it might have been made so. So in State Board of Equalization vs. Blind Bull Coal Co., 101 Pac. 2nd 70 where a sale was held to have been local the decision was based upon the fact the *contracts of sale* "did not involve any extrastate orders".

As pointed out however in McGoldrick vs. White, 85 Law Ed. 565, a contract of shipment does not necessarily change the nature of an interstate shipment nor affect the power of the state to deal with goods after they have reached their destination in that state. I have attempted no such application of the contract in this case. I have dwelt upon it and given it effect as showing the nature of the delivery made by plaintiff of its oil into the vessel at Long Beach and to show that that delivery was in pursuance of the contract of purchase, was in furtherance of it and that it was but a mere step in the execution of a genuine export transaction.

Under the rule of these cases the case before us affords a classic example of an export purchase and sale. The government of New Zealand required oil for the use of its

branch of the British Navy. Plaintiff in California offered to supply the oil, and as a result a sale was effected, the contract therefor being concluded in New Zealand. Under the terms of that contract the tender of plaintiff "for the supply of two cargoes * * * of oil fuel to the New [fol. 67] Zealand Division of the Royal Navy" was accepted by the representative of the New Zealand Government. Delivery of the oil was to be into "N. Z. Naval tank steamer R. F. A. Nucula, at Los Angeles, but this delivery was to be given to the order of the Naval Secretary, Naval Office, Wellington." The delivery of the oil involved in this case was made in pursuance of such an order. But that did not end plaintiff's connection with the resulting export. Under the terms of the contract plaintiff was still to make advances to the Master of the Nucula "up to £.300 to meet disbursements at the port of loading". Some of this advance must have had to be made as the oil flowed into the vessel, and some after it had all been so delivered as the amount of disbursements could not be known until the vessel was ready to depart from the port. Plaintiff was also required, after the oil had been loaded on the vessel to supply "bills of lading and other customary shipping documents" to the Master of the Nucula and to consign the oil "to the Naval Officer in charge, Auckland, New Zealand". Payment for the oil was not made at that time as appears from the fact that plaintiff was required to advance to the Master "up to £.300" which was to be repaid when the oil was to be paid for. Payment for the oil was later made "by the High Commissioner for New Zealand in London to the credit of the Richfield Oil Company, Los Angeles". It will be seen that plaintiff remained connected with the transaction until the oil was upon the seas, and that everything it did, including the pumping of the oil into the tanks of the vessel was in pursuance of a contract of export and in aid [fol. 68] and execution of it. The cases speak of the various acts involved in the total performance of a contract of export to be merely "steps" in its complete execution. Where a shipment has actually been made to a foreign country in pursuance of a plan to that effect "to give it a various character by the steps in its transportation would be extremely artificial". 57 Law Ed. 448.

The substantial identity of this case with Spaulding Brothers vs. Edwards, 67 Law Ed. 865, should be sufficient to support the conclusion reached herein. Defendant seeks to

distinguish that case however by saying that the delivery of the shipment therein was to a common carrier while in this case it was not. The rule is not absolute that delivery to a common carrier is essential to commit a shipment to export; it is enough that it is in process of export. The reason for the rule requiring delivery to a common carrier, where such a delivery is required, is that in that way the shipment is irrevocably consigned to its foreign destination; that there must be no danger as there would be in the case of a private person, that the export might be defeated by some fraudulent arrangement between the shipper and the person.

Here the oil was loaded upon a war vessel of a responsible foreign government, a vessel under the sole control of the power to which the oil was consigned. The chance that the oil was not as certain of delivery to its consignee as if it were on a common carrier, is not even speculation. As was said by Justice Holmes in the Spaulding case in dis- [fol. 69] cussing a similar question: "There was not the slightest probability of any such change and it did not occur". Another quotation from that eminent scholar who made simple every apparently involved question to which he addressed himself. In Superior Oil Co. vs. Mississippi, 74 Law Ed. 74, after holding in the circumstances of that case that a delivery to the purchaser left him with no obligation to finish an interstate transaction, Justice Holmes said: "Dramatic circumstances, such as a great universal stream of grain from the state of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here". In our case we have the dramatic circumstance of a sale to a great government and carriage by a warship, forbidding any doubt as to the prompt and direct delivery which was actually made.

Defendant contends that the appeal of the plaintiff here that its shipment could not legally be taxed is with reference to a matter which is not within the protection of the Constitution; that the Constitution only forbids imposts on exports which are directly addressed to exports and discriminate against them. The cases above hold that no tax can be imposed upon an export shipment while it is actually moving toward its destination. It seems clear however, that to accept defendants narrowest requisite, to levy a sales tax on an export while it is actually moving in transit is an

act which directly burdens the export contrary to the Constitution.

Defendants final contention is that the question at issue [fol. 70] here has just been decided by our Court of Appeal adversely to plaintiff in the case of Standard Oil Co. vs. Johnson, 132 Pac. 2nd, 910. The very able decision in that case contains a masterly analysis of the early and current decisions of our courts involving the taxation of goods claimed to have been entitled to the protection given by the Constitution to interstate commerce. But that decision is broadly distinguished from the case before us. In the first place the learned Presiding Justice who wrote that decision distinguished that case from the case of Spaulding Bros. vs. Edwards by saying that that case was one involving exports in which a different provision of the Constitution than that relating to interstate commerce applied. As the Spaulding case is essentially identical with the case before us, I might rest upon this distinction which was not only specifically made but is obviously correct. This distinction of the Spaulding case from cases involving interstate commerce was also made in Superior Oil Company vs. Mississippi, 74 Law Ed. 504 and State Board, etc. vs. Blind Bull Coal Co., 101 Pac. 2nd 70. I think this distinction is warranted.

With the improvement by means of transportation, the great speed of its movement and the volume of its activities, unless some of the earlier restrictions on taxation as burdening interstate shipments are relaxed vast quantities of property would escape taxation altogether. This does not apply to cases of export in anything like the same degree. See Sonneborn Bros. vs. Keeling 67 Law Ed. 1095. But [fol. 71] Standard Oil Co. vs. Johnson, 132 Pac. 2nd 910, can be clearly distinguished from the case before us on other grounds. In that case both parties to the contract of purchase and sale were doing business in California, the contract was made here. Immediately upon the execution of the contract, the purchaser Southern Pacific Company became entitled to have delivered to it the oil mentioned in the contract. The delivery was to be made from time to time upon the order of the purchaser, and at either one of two places as it might choose.

The oil was to be shipped to such point within the territorial activities of the purchaser as it should designate, but was to be delivered to itself and onto its own cars. The

Southern Pacific Company did business in several western states, including California and it could direct the shipment to be made to any one of these states. The shipment being delivered to them absolutely on their own cars operating over their own rails was subject to its control. It could have directed a shipment to be made to itself in New Mexico and after its receipt could have changed its purpose and held and used the oil in California.

The Motion of Plaintiff to amend its complaint to show the intention of the parties in the arrangement and execution of this contract will be denied.

Where there is no ambiguity in a writing the meaning of the writing must be determined from itself and what the parties to it did in its execution.

[fol. 72] The Judgment will be for the Plaintiff.

Dated: April 28, 1943.

Peter J. Shields, Judge.

ADDED COMMENT

Just as the foregoing opinion had been concluded the decision in the second case of Standard Oil Co. vs. Johnson, published in the April 16th issue of 57 A. C. A. 917 reached me. I think that the facts in that case sufficiently distinguish it from the case before me, but certain language used therein require an additional definition of difference.

In the first place the Standard Oil Company was complaining that it had been denied the protection of that provision of the Constitution reserving to Congress the sole power to regulate commerce between the States. Of this the Court says in this, its most recent decision, quoting from McGoldrick vs. Berwind, etc., 84 Law Ed. 565: "It is only when the tax operates to regulate commerce between the states or with foreign nations To An Extent Which Infringes the Authority Conferred Upon Congress, that the tax can be said to exceed constitutional limitations." Continuing its quotation from this same case it is said: "If as guides to decision we look to the purpose of the commerce clause to protect interstate commerce from discrimination or destructive state action, and at the same time to the purpose [fol. 73] of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax

burdens, and to the necessity of judicial reconcil-ation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation, *which in the absence of congressional action*, the commerce clause forbids". It will be noted from this language that it is not every regulation of commerce between the states that is invalid, it is only such as "infringes the authority conferred upon Congress" and that State taxes may "in the absence of congressional action" be enforced, which congress could have prohibited. But in the case of exports there is no absence of congressional action, or otherwise. The Constitution itself says that neither the congress nor the states shall have power to levy *any* impost upon exports. The prohibition is comprehensive and positive. The Plaintiff in the case before us claims the protection of that provision of the Constitution and it cannot be denied to it. The law is well setfled that after goods start upon their journey as exports and while they are actually moving as such, that they cannot be taxed. For Defendant to prevail in view of this state of the law it would have to establish that the sale here in question was not an export transaction. This it attempts to do by contending that plaintiffs part in the sale was to pipe its oil to Long Beach and deliver it to the New Zealand vessel sent there to receive it, and that then it was done, the sale completed and the tax matured. But we have seen that delivery by a local seller to one who buys [fol. 74] with a view to export does not necessarily constitute a local transaction. If the delivery was to a purchaser who was free after he received the goods to do with them as he saw fit, the fact that he intended to export them and actually did export them would not be enough to make the sale an export sale. But where the delivery of goods was made under a contract providing a plan of export which was actually carried out, insuring the delivery of the goods to their foreign destination, then delivery by the owner even though it may have passed his title has always been held to have been a part of the export and a step in its progress. Delivery to the foreign purchaser f.o.b. the port of shipment admittedly does not change the character of goods as export, nor does it interrupt the flow of the goods in their export movement. Can less be said of their like delivery to a foreign government on one of its warships under contract to transport the goods to a point in the foreign land

with particular reference to which the parties have contracted? In each of these cases the very act of delivery committed the goods irrevocably to the completion of their export journey. To treat them differently would be to create a distinction without a difference.

Other points of difference distinguish the Standard Oil case from the case before me. In that case the buyer and seller were each in California, the contract of sale was made here, the oil was delivered to the purchaser, in California, and paid for here. It was placed on the purchasers own [fol. 75] cars and billed at its direction and to a destination named by it. Thereafter the seller was entirely free of the transaction and the purchaser with its oil in its possession, in California, free to do with it as it saw fit. In the case under consideration the seller was in California and the purchaser in New Zealand; the contract of sale was made in New Zealand. Bids were asked for, to be submitted to the purchaser in New Zealand for oil "required by the New Zealand division of the Royal Navy", and plaintiffs bid was accepted "for the supply of two cargoes each of 65 tons * * * of fuel oil to" the purchaser, the oil to be delivered upon a vessel of the purchaser "and the oil consigned to the Naval Officer in Charge, Auckland, New Zealand." Plaintiff was to advance to the Master of the vessel sent to receive and transfer the oil a sum of money "up to £300" for expenses at the port while the oil was being loaded. Payment for the oil and repayment of the sums advanced for expenses was later to be made, to the credit of Plaintiff, in London. To call this transaction, so formally conducted, of so obvious a character and so evidently in such complete good faith, a mere local purchase at Long Beach, would be a purely arbitrary pronouncement.

Plaintiffs position might be made clearer if stated in another way. There was a party in New Zealand which wanted oil for use there. A party in California was found which had oil for sale. A contract was made between them by which the oil was to be transported from California to New Zealand through which the party here who wanted to sell its [fol. 76] oil was enabled to sell it to the New Zealand party which wanted to purchase it. A plan was made by which this purpose was effected, and the *export* of the oil by the California party was completed. Can we call it by any other name than export?

Admitting that the New Zealand party arranged to purchase the oil here it was purchased as part of a plan to get the oil from here to New Zealand. Every portion of the contract was made with a view to effecting that purpose. As a result of the execution of the contract the oil began to move from California and it continued to move in an uninterrupted progress from here to New Zealand. An export was actually effected through the cooperation of successive acts, every one of which, including the delivery of the oil by the California owner, was a part of its execution. It can't be said that an act which was so essential to an export was not a part of it. I can't say it better than it was said in the Sabine case, 57 Law Ed. 442, 448 "There must be a transshipment at the seaboard; (in the instant case Long Beach) and if that may be made the point of ultimate destination by the devise of separate bills of lading, the commerce will be given local character though it be essentially foreign."

I can see no conflict between the conclusion reached in this case, as above and the Standard oil case, and that conclusion is adhered to.

P. J. S., Judge.

[File endorsement omitted.]

[fol. 77] In Superior Court of Sacramento County

Findings of Fact and Conclusions of Law—Filed May 24, 1943

The above entitled action came on regularly for hearing before the Honorable Peter J. Shields, Judge, a jury trial having been expressly waived by the respective parties. The plaintiff appeared by Norman S. Sterry, Esquire, of the firm of Gibson, Dunn & Crutcher, counsel for the said plaintiff, and the defendant by Adrian A. Kragen, Esquire, Deputy Attorney General of the State of California, counsel for the said defendant. Plaintiff introduced in evidence two stipulations of fact with documentary evidence attached thereto. The defendant offering no evidence, the cause was submitted to the court upon the pleadings and the said stipulations, and being closed, argued and submitted to the

court, and the court having carefully considered the matter and being fully advised in the premises, makes the following

FINDINGS OF FACT

I

All of the allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X, of the Complaint are true.

II

That the invitation for bids alleged in Paragraph VI of the said Complaint was issued by the New Zealand Government Stores Control Board, hereinafter referred to as "Control Board", at Wellington, New Zealand, on or about the 3rd day of December, 1936, and was in words and figures as follows:

[fol. 78] "New Zealand Government Stores Control Board

Tender Schedule No. 28—Oil Fuel for N. Z. Division of the Royal Navy

"Tenders are invited for the supply of one cargo of 6,500 tons (approx.) of oil fuel required by the New Zealand Division of the Royal Navy for delivery f.o.b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer. Delivery to be taken about the middle of March, 1937.

Alternative tenders are required for payment as under:

(1). Net cash, Wellington, New Zealand.

(2). Net cash, London, England.

Conditions of Tender:

1. Tenders must be in writing and must be enclosed in a sealed envelope, marked on the outside 'Tender for Fuel Oil', and must reach the Secretary, New Zealand Government Stores Control Board, Wellington, not later than 4 p. m. on Tuesday, 12th January, 1937.

Tenders must hold good for 30 days.

2. The oil fuel must be in accordance with Specification S. C. B. 28/1 attached.

3. Tenderers must state the specific gravity of the oil offered.

4. No advertisement relative to the acceptance of this tender shall be published in any newspaper, journal or other advertising medium unless such advertisement has first been submitted to and approved by the New Zealand Government Stores Control Board.

[fol. 79] 5. The lowest or any tender will not necessarily be accepted.

P. Glenn, Secretary.

Wellington,

3rd December, 1936."

III

That as alleged in Paragraph VI of said Complaint, Hodder & Tolley, Ltd., acting as agents of William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California, sometimes hereinafter referred to as "plaintiff's predecessor in interest", transmitted said bid to said William C. McDuffie as Reorganization Trustee of Richfield Oil Company of California, as alleged in said Paragraph VI. That after the submission by Hodder & Tolley, Ltd., as agents of plaintiff's predecessor in interest of the bid of said plaintiff's predecessor in interest, the Control Board requested Hodder & Tolley, Ltd. to ascertain if the bid could be understood as submitted for one or two cargoes of oil at the option of the said Control Board. That plaintiff's predecessor in interest by cable authorized the said Hodder & Tolley, Ltd. to advise the said Control Board that said bid could be accepted by said Control Board at its option for one or two cargoes of fuel oil of approximately 6,500 tons each, and said Hodder & Tolley, Ltd. did so notify the said Control Board; and thereafter, the said Control Board elected to accept the [fol. 80] said bid for two cargoes of fuel oil and, as alleged in Paragraph VI of said Complaint, executed and delivered to Hodder & Tolley, Ltd., as agents of said plaintiff's predecessor in interest, a written contract or agreement,

referred to in Paragraph VI of the said complaint in words and figures as follows:

"S. C. B. 5/10/2.
N. Z. Govt. Stores Control Board,
Wellington, N. Z.
4th February, 1937.

"Messrs. Hodder & Tolley, Ltd., Box 135, Palmerston North.

GENTLEMAN,

I am directed to advise that your tender dated 13th January, 1937, is accepted for the supply of two cargoes each of 6500 tons (approx) of oil fuel to the New Zealand Division of the Royal Navy, subject to the following conditions:

(1) Price 24/8.4 per ton of 2240 lbs. Fob Los Angeles, payment in London, with conversion at $4.90 to £ any variation at date of payment to be to the account of the Naval Department.

(2) Payment shall be made by the High Commissioner for New Zealand in London to the credit of the Richfield Oil Co., Los Angeles, at Barclay's Bank, Chief Foreign Branch, London.

(3) Delivery shall be given to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank steamer R. F. A. "Nucula" at Los Angeles, California. [fol 81] Delivery of the first cargo shall be given on or about the 15th March, 1937, and of the second cargo on or about the 21st May, 1937, or as at such other time as may be mutually agreed upon.

(4) The oil supplied shall conform in all respects to the specification copy of which is attached. Note: It is particularly desired that the hard asphalt content be as low as possible and not more than 2%.

(5) The oil shall be inspected by Messrs. Charles Martin & Co. at a cost of two cents per ton.

(6) The Master of the "Nucula" shall wireless the Richfield Oil Co. when seven days and also when 24 hours out from Los Angeles.

(7) The Richfield Oil Co. shall advance to the Master of the "Nucula" at Los Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading on each trip, such advance to be repaid when payment is made for the fuel oil.

(8) Bills of Lading and other customary shipping documents shall be handed to the Master of the "Nucula" and the oil consigned to the Naval-Officer-In-Charge, Auckland, New Zealand.

(9) Should there be any breach of these conditions on the part of the contractors or their authorized agents this agreement may be summarily determined by the Accounting Officer of the N. Z. Naval Tank steamer present for the purpose of accepting delivery of the fuel oil at the port of [fol. 82] delivery, giving notice in writing to that effect to the contractor's agents, or by the Naval Secretary at Wellington giving notice in a like manner to the contractors at their registered office at Wellington, New Zealand.

(10) No advertisement relative to the contract shall be published in any newspaper, Magazine, journal or other advertising medium unless such advertisement has first been submitted to and approved by the Stores Control Board.

Please confirm by signing the attached duplicate of this agreement and returning to me at your earliest convenience.

Yours faithfully, Secretary."

"New Zealand Government Stores Control Board

Specification S. C. B. 28/1—Oil Fuel for the New Zealand Division of the Royal Navy

Flash Point: Not to be lower than 175° F. as obtained by the Pensky-Marten close test.

Sulphur: Not to exceed 1.5%.

Acidity: The oil fuel supplied shall be free from inorganic acidity and as free as possible from organic acidity.

Water: Not to exceed 0.5%.

[fol. 83] Viscosity: Not to exceed 1,000 seconds for an outflow of 50 cubic centimeters at a temperature of 32° F., as determined by Redwood's Standard Viscometer No. 11 (Admiralty type for testing oil fuels).

Notwithstanding that the maximum viscosity allowed by the general specification is 1,000 seconds at 32° F. the actual

warranty or condition of contract will be the figure guaranteed by the firm tendering.

Calorific Value: Not less than 18,400 B. T. U.'s per lb.

Specific Gravity: 0.89 to .946 at 60° F. (Approximately .94 preferred).

Impurities: The oil shall be free from earthy, carbonaceous or fibrous matter or other impurities which are likely to choke the burners.

Note: In the case of Persian Oil Fuel the viscosity is not to exceed 1000 seconds at 40° F. and a bottle test is to be carried out as follows:

About 200 mls. of the sample as received are filtered at laboratory temperature through 36 mesh wire gauze and placed in a pint bottle of 2¾ ins. internal diameter. The bottle is then carefully packed in melting ice in an ice [fol. 84] chest in such a manner that the oil is maintained at 32° F. for a period of at least 16 hours and not more than 24 hours. The bottle is then removed and gently inverted. If the oil is wholly or partially set, the bottle is shaken for not more than 5 seconds. The oil when subjected to the 'Bottle' test must either:

(a) Flow as a uniform liquid or

(b) If partially or wholly set flow as a uniform liquid when shaken as above. The sulphur content is not to exceed 3%.

Wellington,

3rd December, 1936."

IV

That the said contract or agreement above set forth was received by said Hodder & Tolley, Ltd., as agents of plaintiff's said predecessor in interest, at Palmerston, New Zealand, and upon its receipt, said Hodder & Tolley, Ltd. as agents in New Zealand for William C. McDuffie acting as Reorganization Trustee of Richfield Oil Company of California, executed a duplicate of said contract or agreement and delivered the same to the Control Board at Wellington, New Zealand.

V

That pursuant to said contract or agreement, the said Control Board dispatched the New Zealand Naval Tank

Steamer R. F. A. "Nucula" to plaintiff's Marine Terminal, Long Beach, California, and the first cargo of fuel oil was [fol. 85] delivered to the said R. F. A. "Nucula" on or about the 15th day of March, 1937, at said Marine Terminal, Long Beach, California, and was transported by said R. F. A. "Nucula" to Auckland, New Zealand, and thereupon the said R. F. A. "Nucula" returned to said Marine Terminal, Long Beach, California, for the second cargo; that said second cargo on which the tax sought to be recovered in this action was levied, was delivered by the plaintiff to the said R. F. A. "Nucula" on or about the 14th day of May, 1937, as alleged in Paragraph VI of said Complaint. That the shipment of the first cargo of fuel oil delivered as hereinbefore found to the said R. F. A. "Nucula" on or about the 15th day of March, 1937, was handled and payment for it made in substantially the same manner as alleged in Paragraph VI of the said complaint with reference to the second shipment. Payments for the said shipments were made to plaintiff's agent in London.

VI

That at all times mentioned in the complaint, the refinery of plaintiff and its predecessor in interest was located at Watson, California, about midway between the City of Los Angeles and plaintiff's Marine Terminal at Long Beach, California. That at all times mentioned in the Complaint, plaintiff and its predecessor in interest maintained storage tanks at its Marine Terminal, connected with the refinery tanks of plaintiff and its predecessor in interest at Watson, by a pipe line.

[fol. 86]

VII

That at the time of the trial plaintiff did not have a record of any message from the Master of the R. F. A. "Nucula" on either voyage other than those required by the contract, but it was customary for the tankers approaching port after first wirelessing their position to keep the shipper advised of the daily progress.

VIII

That as to each cargo, when the plaintiff was advised that the "Nucula" was between twenty-four and forty-eight hours from Marine Terminal, Long Beach, the plaintiff

started pumping oil from its refinery tanks at Watson to its storage tanks at Marine Terminal, and continued pumping until the entire cargo had been pumped into the storage tanks. As soon as the "Nucula" docked and was ready to receive the oil, the said oil was pumped from the storage tanks into the "Nucula." At the time of trial there were no records available to show as to either trip of the "Nucula" whether the "Nucula" was ready to receive the oil before the entire cargo had been pumped into the storage tanks, but on neither occasion was the oil held in the storage tanks more than twenty-four to thirty-six hours before the plaintiff started pumping it from the storage tanks into the "Nucula." That after the pumping of said oil from the storage tanks into the "Nucula" started, it was continued without interruption until the entire cargo was delivered into the tanks of the "Nucula."

[fol. 87] IX

That the export declaration executed by the plaintiff's predecessor in interest, as alleged in Paragraph VI of the Complaint, was in words and figures as follows:

UNITED STATES CUSTOMS SERVICE

Read carefully the instructions on back to avoid delay at shipping point.

SHIPPER'S EXPORT DECLARATION
OF SHIPMENTS TO FOREIGN COUNTRIES OR NONCONTIGUOUS TERRITORIES OF THE U. S.

Clearance will not be granted until shipper's declaration has been filed with the Collector of Customs.

(Declarations should be typewritten or prepared in ink; pencil is not permissible.)

Form 7525

United States Department of Commerce, Bureau of Foreign and Domestic Commerce, Regulations, Federal Register, June 2 and August 31, 1938.

File No. ——, Section Customs Statistics.

This space for use of Customs.

Customs File No. ——, Statistical Code Nos. ——. District ——. Port ——. Flag ——. Country ——.

Goods shipped by Richfield Oil Corporation.

(Name of actual shipper) If shipped by Agent, insert name and address of principal, seller, or consignor on second line below.

Address (Number) 555 (Street) South Flower Street, (City) Los Angeles, (State) California.

Shipment invoiced by Richfield Oil Corporation.

(If shipped by Agent, insert name and address of principal, seller, or consignor.)

[fol. 88] For shipment on the New Zealand Navy Tanker "Nucula".

(Name of carrier. If vessel, give name and nationality.)

From Long Beach, Calif.

(U. S. Customs port of exportation.)

To final country of destination Auckland, New Zealand.

(Not country where transshipped) (City) (Country)

(Here follows 1 photolithograph, side folio 89.)

Marks and numbers	Number and kind of packages	DESCRIPTION OF GOODS Describe each kind of goods in detail. Do not use general terms such as meats, dry goods, machinery, fruits, etc. (See instructions on back, Par. 3)	Net quantity in pounds, long tons (of 2,240 pounds) gallons, yards, bushels, barrels, etc., as required by Schedule B	VALUE AT TIME AND PLACE OF EXPORT U.S. Products, including foreign goods altered or remanufactured in the United States	Foreign products in same condition as imported	Statistical Class No., Schedule B
			Barrels	Nearest whole dollars	(no cents nor ciphers)	
NIL	In Bulk	Fuel Oil	43,757	$39,381		5031

Waybill or manifest No._____

May 15, 1937
(Date of exportation)

Total $39,381

[fol. 90] I authorize —— to act as my agent for customs purposes.

—— ——, Shipper.

I declare that the above is a true account of merchandise shipped to the country named; and that the description and quantity of each article are truly stated at the selling price or market value at time and place of exportation.

Sworn and subscribed to before me on —— ——, 19— —— —— (Title or Designation), (Authorized to adminster oaths under Sec. 486, Tariff Act of 1930.)

(Signature) B. D. Clanchard, (Capacity) Agent (Member of firm, secretary, agent, etc.), (Address) 555 So. Flower St., Los Angeles, California.

Instructions

Follow carefully to avoid delay at shipping point.

1. Provisions of Law (Secs. 4197 and 4200, Rev. Stat. U. S., and Sec. 1, Act March 3, 1893.)

(a) Vessels shall not be cleared for foreign ports until manifests (or declarations) verified by oath, of the cargo, or its parts, have been delivered to the collector by the owners, shippers, or consignors thereof.

[fol. 91] (b) Leaving without clearance subject to a penalty of $500.00.

(c) Similar provisions apply to exportations by rail, vehicle, or ferry.

(d) Declarations should give total quantities and values for each kind of article.

The final city and country of destination, to which the goods are sold, should be given for goods shipped through the Panama Canal Zone, Canada, Great Britain, or other seaboard countries for transshipment to ultimate countries of destination, such as through Chile or Peru, destined to Bolivia.

2. Declarations.

(a) Must be made in duplicate for all merchandise shipped to foreign countries or to and from noncontiguous

territories of the United States, with the exception of bonded shipments in transit through the United States. (A copy of this Declaration is acceptable in various foreign countries to meet certain of their entry requirements. Therefore, on shipments to those countries, the Declaration may be submitted in triplicate. This list of countries includes Canada, Estonia, Haiti, and Panama. A third copy of this Declaration, when certified by a United States customs officer, is accepted by the customs authorities of Yugoslavia, in lieu of a certificate of origin.)

(b) Both original and duplicate must be signed. The [fol. 92] original covering shipment by vessel valued at more than $100 must be verified by oath before a notary public, customs officer, or other person authorized to administer oaths. Oath is not required on declaration covering shipment to Canada or Mexico by car, vehicle, or ferry.

(c) Agent's authority must be in writing on declaration or other document filed with the collector. Declarations are treated as confidential.

(d) Declarations must be presented to the Collector of Customs, who will retain the original and certify the duplicate for presentation by shipper to the transportation company, to be attached to outward vessel or car manifest.

(e) When shipments are made from the interior on through bills of lading to foreign destination, declarations in duplicate must accompany waybills (if preferred, in sealed envelope) to port of exportation.

(f) On local bills of lading, declarations may accompany the goods, or be mailed to consignee at seaboard.

(g) Separate declarations should be prepared for each car load.

3. Description of Articles.

(a) Must be definite and complete. Trade-mark names and general terms, such as "dry goods", "groceries", "meats", etc., are not sufficient. The total quantity and value of each class of articles should be stated in one item.

(b) Quantities must be expressed in unit measures of pounds, tons (of 2,240 pounds), yards, gallons, etc., as re- [fol. 93] quired by Schedule B.

(c) Values (the selling price or actual market value at time and place of exportation) for all articles grown, produced, or manufactured in the United States, must be stated in the column "U. S. Products."

(d) Values of articles of foreign origin, reexported in same condition as imported, must be stated in the column "Foreign Products." Foreign articles changed by alteration or manufacture become "U. S. Products."

(e) Certificates of inspection by the Department of Agriculture, for exports of cheese, oleomargarine, butter, meats, and other food products must be furnished when required.

4. Schedules and Blanks.

(a) Schedule B, statistical classification of exports, may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D. C., or from the District Offices of the Bureau of Foreign and Domestic Commerce, located in principal cities, or Collectors of Customs.

(b) Shipper's Export Declarations may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D. C., or from Collectors of Customs for 30 cents per block of 100. They may be printed by private parties provided they conform to the official form in size, wording, color, and arrangement.

X

[fol. 94] That the Bill of Lading executed by the Master of the R. F. A. "Nucula," as alleged in said Paragraph VI of the Complaint was in words and figures as follows:

Richfield Oil Corporation, 555 South Flower Street, Los Angeles, Cal.

Shipped in apparent good order and condition by Richfield Oil Corporation on board the British Steamship called the R. F. A. Nucula whereof G. Atwood is master, now lying in the Port of Long Beach, California, and bound for Auckland, New Zealand, to say 43,756.85 bbls., of 42 U. S. Measured Gallons; Fuel Oil in bulk at 60° F., equivalent to 6,419.95 Long Tons of 2240 lbs. to be delivered at the Port

of Auckland, New Zealand, or so near thereto as she can safely get always afloat unto Naval Officer in Charge, Auckland, New Zealand, or to his or their assigns, he or they paying freight at the rate of as agreed.

Contents, quality, weight and *guage* unknown.

Not responsible for leakage or deterioration of quality.—General Average Payable according to York-Antwerp Rules of 1924, and as to matters not therein provided for, according to usages and customs of the port of San Francisco. In case a General Average Statement to be required, the same to be adjusted at San Francisco by adjusters to be appointed by the Owners, who are to attend to the settlement and collection of the average, subject to customary charges. Should the vessel put into a port of distress or be under [fol. 95] average, she is to be consigned to Owner's Agents, paying them the usual charges and commissions.

It is mutually agreed that the Ship shall have liberty to sail without pilots; to tow and assist vessels in all situations; to deviate for the purpose of saving life or property; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owner of the goods, and, in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to transship the goods to their destination by any other steamship.

It is also mutually agreed, that the Carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters, by fire from any cause wheresoever occurring; by barratry of the master or crew, by enemies, pirates, or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default or error in judgment of the pilot, master, marines, or other servants of the ship owner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them or

by the Ship's Husband or Manager); nor for the heat-
[fol. 96] ing, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk, or transshipment; nor for any loss or damage caused by the prolongation of the voyage.

It is mutually agreed that if due diligence shall have been exercised to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster, resulting from accident, or faults or errors in navigation, or in the management of the vessel, or from any latent defect in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners of the cargo shall, nevertheless, pay salvage and any special charges incurred in respect of the cargo, and shall contribute in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force
[fol. 97] and effect, and to the same extent, as if such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel, or any latent defect or unseaworthiness.

1. It is also mutually agreed that the Carrier shall not be liable for Gold, Silver, Bullion, Specie, Documents, Jewelry, Pictures, Embrioderies, Works of Art, Silks, Furs, China, Porcelain, Watches, Clocks or for goods of any description which are above the value of $500 per package, unless Bills of Lading are signed therefor, with the value therein expressed, and a special agreement is made.

2. Also, that shippers shall be liable for any loss or damage to ship or Cargo caused by inflammable,

explosive or dangerous goods, shipped without full disclosure of their nature, whether such Shipper be Principal or Agent, and such goods may be thrown overboard or destroyed at any time without compensation.

3. Also, that the Carrier shall have a lien on the goods for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking of packages or description of their contents.

4. Also, that in case the ship shall be prevented from reaching her destination by Quarantine, the Carrier may discharge the goods into any Depot or Lazaretto, and such discharge shall be deemed a final delivery [fol. 98] under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

5. Also, that if the goods be not taken by the consignee within such time as is provided by the regulation of the port of discharge, they may be stored, by the Carrier, at the expense and risk of their owners.

6. Also, that full freight is payable on damaged goods, but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

7. Also, freight is to be considered as earned upon shipment and is to be retained by the ship owners, vessel or cargo lost or not lost.

8. Also, the owner shall have a lien on the cargo for all freight, hire, advances, charges, dead freight, demurrage, cost of recovering same, taxes, duties and fines, which may be incurred or sustained or be imposed upon it, and all expenses to owner resulting from any errors or onmissions of charterer. Dues and other charges upon the cargo shall be paid by charterer, and dues and other charges upon the vessel shall be paid by owner.

9. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the Carrier shall be entitled to recover the difference from the shipper.

10. Also, that in the event of claims for short delivery [fol. 99] when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the Ship's entry at the Custom House, less all charges saved.

11. All conditions and exceptions contained in Charter Party dated —— —— are hereby made a part of this bill of lading.

And finally, in accepting this Bill of Lading, the Shipper, the Owner, and Consignee of the goods and the holder of the Bill of Lading, agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such Shipper, Owner, Consignee or Holder.

In witness whereof, the Master or Agent of the said Ship hath affirmed to three Bills of Lading all of this tenor and date numbered consecutively, one of which being accomplished, the others to stand void.

It is also mutually agreed that shipment made hereunder is subject to all of the provisions of Sections 4281, 4282 and 4283 of the Revised Statutes of the United States and the amendments thereto, and of Section 3 of the Act of Congress of the United States, approved February 13, 1893, and entitled "An Act Relating to the Navigation of Vessels," etc.

Dated in Long Beach, Calif. this 14th day of May, 1937.

(Signed) Geo. Atwood, G. Atwood, Master.

[fol. 100]

XI

That the tax sued for in this case of $1,514.78 was levied by the defendant Board upon the gross receipts from the sale of said second cargo of oil delivered to the said "Nucula" on or about the 14th day of May, 1937, as hereinbefore found.

XII

That it is not true, as alleged in Paragraphs II and III of the Answer, that the said tax was not with respect to an export sale but, on the contrary, the sale of said oil constituted an export sale, and from the inception of negotiations it was contemplated by all parties thereto that said

oil would be exported from California to New Zealand, and said oil was exported and conveyed by the said "Nucula" from California to New Zealand.

XIII

That all acts of the plaintiff herein, including the delivery of the oil into the tanks of the R. F. A. "Nucula", were in pursuance of a contract made between the plaintiff's predecessor in interest and the New Zealand Government Stores Control Board for the exportation of oil from California to New Zealand, and the delivery of the oil to the R. F. A. "Nucula" was a mere step in aid and execution of the said contract for the exportation of oil and for its said exportation.

XIV

That the denials of Paragraphs IV and V of the defend-[fol. 101] ant's Answer are not true.

From the foregoing Findings of Fact, the court makes the following

Conclusions of Law

I

That the sale and delivery of the said oil to the R. F. A. "Nucula" constituted and was an export sale of the said oil within the meaning of Article I, Sections 9 and 10, of the Constitution of the United States.

II

That the said sale of oil by the specific provisions of the California Retail Sales Tax Act was exempt from any tax provided in said Act.

III

That all acts of the plaintiff herein, including the delivery of the oil into the tanks of the R. F. A. "Nucula", was in pursuance of a contract made between the plaintiff's predecessor in interest and the New Zealand Government Stores Control Board for the exportation of oil from California to New Zealand, and the delivery of the oil to the R. F. A. "Nucula" was a mere step in aid and execution of the said contract for the exportation of oil and for its said exportation.

IV

That if the said California Retail Sales Tax Act as amended be construed, applied or enforced in such manner [fol. 102] as to impose a tax upon said sale of fuel oil hereinbefore described, said Act is invalid, illegal and unenforcible, in that it is contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States.

V

That the plaintiff is entitled to recover the sum of $1514.78, together with interest thereon at the rate of seven percent. per annum from and after the 7th day of July, 1942.

Done in open court this 24th day of May, 1943.

Peter J. Shields, Judge of the Superior Court.

[File endorsement omitted].

[fol. 103] In Superior Court of Sacramento County

Judgment—Filed May 24, 1943

The above entitled action came on regularly for hearing before the Honorable Peter J. Shields, Judge, a jury trial having been expressly waived by the respective parties. The plaintiff appeared by Norman S. Sterry, Esquire, of the firm of Gibson, Dunn & Crutcher, counsel for the said plaintiff, and the defendant by Adrian A. Kragen, Esquire, Deputy Attorney General, of the State of California, counsel for the said defendant. Plaintiff introduced in evidence two stipulations of fact with documentary evidence attached thereto. The defendant offering no evidence, the cause was submitted to the court upon the pleadings and the said stipulations, and being closed, argued and submitted to the court, and the court having made and entered its written Findings of Fact and Conclusions of Law wherein and whereby it found that the plaintiff was entitled to have and recover from the defendant the sum of $1,514.78,

Now, therefore, by virtue of the premises and the law,

It is ordered, adjudged and decreed that the plaintiff do have and recover of and from the defendant the sum of

$1,514.78, together with interest thereon at the rate of seven percent per annum from the 7th day of July, 1942.

Done in open court this 24th day of May, 1943.

Peter J. Shields, Judge of the Superior Court.

[fol. 104] Attest: T. F. Patterson, Clerk, By Wm. Hickey, Deputy Clerk. (Seal).

[File endorsement omitted.]

Endorsed: "No, 65798. Judg't Entered May 25, 1943, in Judgment Book 93, Page 92 at 11:15 o'clock a.m. Judgment Roll Filed May 25, 1943. T. F. Patterson, Clerk, By James L. Kerins, Deputy."

IN SUPERIOR COURT OF SACRAMENTO COUNTY

STIPULATION AMENDING STIPULATION OF FACTS—Filed July 17, 1943

Whereas judgment has been entered in favor of the plaintiff, and

Whereas the defendant contemplates taking an appeal therefrom, and

Whereas defendant desires to support such appeal by the judgment roll alone except for the fact the defendant desires the record to show the evidence introduced upon the averments of Paragraph VII of the complaint, which averments are found to be true in Finding I,

Now, therefore, it is stipulated by and between the parties [fol. 105] hereto:

That paragraph (5) of the original stipulation read as follows:

> "(5) It Is Further Stipulated, subject to the competency, relevancy and materiality of the facts herein stipulated to, that if the plaintiff were to produce as witnesses the said Wm. C. McDuffie, and the proper servants, agents, officers and employees of Wm. C. McDuffie, acting as Reorganization Trustee of Richfield Oil Company of California, of Hodder & Tolley, Ltd., of the plaintiff Richfield Oil Corporation, of the said Control Board and of the New Zealand Division of the Royal Navy, that each of said witnesses would

testify to the truth of the facts alleged in paragraph VII of the complaint on file herein.

The defendant, while stipulating that said witnesses, if called, would so testify, does not believe that such testimony would be competent, relevant or material, and specifically reserves the right to object to the introduction of paragraph (5) on the ground that the facts to which it is stipulated the witnesses would testify are not competent, relevant or material; and it is specifically agreed that the defendant shall have the same right to so object to the introduction of said paragraph (5) as it would if any of the said witnesses were personally present and testifying on the stand."

[fol. 106] It Is Further Stipulated that at the time of the trial the said paragraph (5) was offered in evidence; that it was objected to by the defendant upon the ground it was incompetent, irrelevant and immaterial, and that the intentions of the parties were to be gained from their acts and conduct and could not be shown by parol testimony at the trial; which said objection was sustained by the court and the said evidence excluded, and none of the persons mentioned in said paragraph (5) was called or offered as witnesses, or testified upon the subject matter covered in paragraph (5) and the finding of the court as to the truth of the averments of paragraph VII of the Complaint was based upon the other facts found by the court, including the conduct of the parties, as set out in the Findings.

It Is Further Stipulated and Agreed that this stipulation may be deemed to be a part of the record on appeal and be considered as part of the judgment roll.

Dated July 14, 1943.

Robert E. Paradise, Norman S. Sterry, Gibson, Dunn & Crutcher, by Norman S. Sterry, Attorneys for Plaintiff; Robert W. Kenny, Attorney General; H. H. Linney, Assistant Attorney General; Adrian A. Kragen, Deputy Attorney General, by Adrian A. Kragen, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 107] IN SUPERIOR COURT OF SACRAMENTO COUNTY

NOTICE OF APPEAL—Filed July 17, 1943

To the Honorable Peter J. Shields, Judge of the above entitled Superior Court and to Robert E. Paradise, Norman S. Sterry and Messrs. Gibson, Dunn and Crutcher, attorneys for plaintiff:

You Will Please Take Notice that defendant in the above entitled action hereby appeals to the Supreme Court of the State of California from the judgment in favor of plaintiff and against defendant herein made and entered on the 25th day of May, 1943, and contained in Judgment Docket 93, at page 92 thereof, and from the whole of said judgment.

Dated: July 16, 1943.

Robert W. Kenny, Attorney General of the State of California; H. H. Linney, Assistant; Adrian A. Kragen, Deputy, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 108] IN SUPERIOR COURT OF SACRAMENTO COUNTY

NOTICE TO PREPARE TRANSCRIPT—Filed July 17, 1943

(Title of Court and Cause)

To Honorable T. F. Patterson, Clerk of the above entitled court:

Your Are Hereby Instructed to prepare the clerk's transcript in the above entitled cause, on appeal to the Supreme Court of the State of California, and to include therein the judgment roll in said cause, the stipulation dated July 14, 1943 relating to Paragraph VII of the complaint, the written opinion rendered by Judge Peter J. Shields, the notice of appeal and this notice to prepare clerk's transcript.

Dated: July 16, 1943.

Robert W. Kenny, Attorney General of the State of California; H. H. Linney, Assistant; Adrian A. Kragen, Deputy, Attorneys for Defendant.

AFFIDAVIT OF SERVICE BY MAIL

SACRAMENTO SUPERIOR COURT

No. 65798

RICHFIELD OIL CORPORATION, Plaintiff,

vs.

STATE BOARD OF EQUALIZATION, Defendant

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a [fol. 109] resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Norman S. Sterry, the attorney of record of the above-named Plaintiff maintains an office at 634 South Spring Street in Los Angeles, County of Los Angeles, State of California; and between said two places there is a regular communication by mail; on the 16th day of July, 1943, I served a true copy of the Notice of Appeal and Notice to Prepare Transcript herein, to the original of which this affidavit is attached, on said last-named attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said attorney at the office thereof, and prepaying the postage thereon.

Helen Monat.

Subscribed and sworn to before me this 16th day of July, 1943. Adrian A. Kragen, Deputy Attorney General.

[File endorsement omitted.]

[fol. 110] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 111] IN SUPREME COURT OF CALIFORNIA

RICHFIELD OIL CORPORATION, a Corporation, Plaintiff & Respondent,

vs.

STATE BOARD OF EQUALIZATION, Defendant & Appellant

ENTRIES IN REGISTER OF ACTIONS

Sept. 28, 1943. Filed Clerk's Transcript on appeal from Judgment.

Nov. 23, 1943. Filed Appellant's Opening Brief.

Jan. 26, 1944. Filed Respondent's Brief.

Apr. 13, 1944. Filed Appellant's Reply Brief.

May 12, 1944. Cause called and argued. Stipulated that any justice pro tem who may be assigned may participate in the decision. Respondent granted permission to print and file his oral argument. Respondent 15 days for additional brief, appellant 15 days to reply. Court to decide upon date of submission.

May 31, 1944. Filed Oral Argument of Norman S. Sterry for Respondent.

June 21, 1944. Filed Appellant's reply to oral argument of respondent.

Dec. 30, 1944. The judgment is affirmed.

Gibson, C. J.

We Concur.

Curtis, J.; Shenk, J.; Schauer, J.; Edmonds, J. (Traynor, J., did not participate herein.)

I dissent.

Carter, J.

Jan. 15, 1945. Filed Appellant's petition for rehearing.

Jan. 29, 1945. Rehearing Granted.

Mar. 5, 1945. Cause called and argued. Traynor, J., being disqualified retired from the bench. Stipulated any [fol. 112] justice pro tem may participate in decision. Respondent granted 20 days to file copy of oral argument and additional authorities; Appellant 20 days to reply thereto. Cause thereafter to be submitted.

Mar. 23, 1945. Filed oral argument of Norman S. Sterry for Respondent.

Mar. 23, 1945. Filed Supp. to oral argument of Norman S. Sterry.

Apr. 27, 1945. Filed Appellant's final brief.

Nov. 1, 1945. The judgment is reversed.

Carter, J.

We concur.

Peters, J., pro tem; Shenk, J.; Schauer, J.; Spence, J.

I dissent. (Opinion filed.)

Gibson, C. J.

I concur.

Edmonds, J.

Nov. 14, 1945. Filed Respondent's petition for rehearing.

Nov. 23, 1945. Filed Answer to petition for rehearing.

Nov. 29, 1945. Rehearing denied. (Gibson, C. J., and Edmonds, J., voting for rehearing.)

(Traynor, J., did not participate herein.)

Dec. 3, 1945. Remittitur issued.

[fol. 113] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPINION—December 30, 1944

GIBSON, Chief Justice:

This is an appeal from a judgment for plaintiff in an action to recover, with interest, a sum paid under protest as a retail sales tax and as interest thereon.

Plaintiff is a foreign corporation authorized to do business in California and engaged in producing, refining and selling crude oil and crude oil products. On December 3, 1936, the New Zealand Government, acting through its official purchasing agency, the Stores Control Board, invited bids for the supply of fuel oil required by the New Zealand Division of the Royal Navy. The invitation provided that bids were to be for delivery "f. o. b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer." Plaintiff instructed its agent in New Zealand to submit a bid specifying that the price quoted was f. o. b. ship's rail of buyer's tanker at the Richfield Marine Terminal at Long Beach, California. Plaintiff's bid was accepted and a written contract for the sale of oil was entered into in New Zealand on February

4, 1937. The contract contained, among other, the following provisions: "(1). Price * * * Fob Los Angeles, payment in London. * * * (3). Delivery shall be given to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank steamer, R. F. A. 'Nucula' at Los Angeles, California. (7). The Richfield Oil Co. shall advance to the Master of the 'Nucula' at Los [fol. 114] Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading * * *, such advance to be repaid when payment is made for the fuel oil. (8). Bills of lading and other customary shipping documents shall be handed to the Master of the 'Nucula' and the oil consigned to the Naval-Officer-In-Charge, Auckland, New Zealand."

On May 14, 1937, pursuant to the contract, plaintiff delivered the oil into the "Nucula" at Long Beach, California. The oil was processed at plaintiff's refinery at Watson and piped to its storage tanks at Long Beach, from which it was loaded aboard the vessel. Following such delivery, plaintiff handed to the master of the vessel customary shipping documents, including a bill of lading designating plaintiff as shipper and providing for delivery unto the Naval Officer in Charge at the Port of Auckland, New Zealand. Plaintiff also filed with the United States Collector of Customs a Shipper's Export Declaration, which reported the shipment by plaintiff from Long Beach, California to Auckland, New Zealand. Thereafter, the entire supply of oil was delivered to the New Zealand Division of the Royal Navy at Auckland, and payment therefor was made to plaintiff in London, England.

On September 25, 1940, defendant assessed a retail sales tax against plaintiff measured by gross receipts from the foregoing transaction. Plaintiff paid the tax with interest, [fol. 115] a total of $1,514.78, under protest on July 7, 1942. In September, it filed a claim for refund which was denied. The present action was then commenced.

The cause was submitted to the trial court on the pleadings and on stipulation of fact entered into by the parties. The trial court found, in addition to the facts heretofore recited that oil had never been produced in New Zealand in sufficient quantities to supply the needs of the New Zealand Division of the Royal Navy, that plaintiff had previously made a shipment of oil to New Zealand under identical circumstances, and that it had always been the

intent of the parties to the contract that the oil would be exported to New Zealand without interruption. The court concluded that plaintiff was entitled to a refund of the amount paid, together with interest thereon, and entered judgment accordingly. This appeal followed.

The California Sales Tax Law imposes a tax upon retailers, measured by gross receipts, "for the privilege of selling tangible personal property at retail," and authorizes retailers to collect the tax from the consumers. (Revenue and Taxation Code, §§6051, 6052.) A sale is defined therein as "any transfer of title or possession * * * in any manner or by any means whatsoever, of tangible personal property * * *." (§6006.) By express provision of the law, gross receipts from sales of property which the state is prohibited from taxing under the Constitution of [fol. 116] the United States are exempt from computation of the amount of tax imposed. (§§6351, 6352.)

The sale or taxable event in the present case occurred when the fuel oil was loaded aboard the tanker "Nucula" at Long Beach, California, it being conceded that title to the oil passed to the New Zealand Government at that time. In support of the judgment, however, plaintiff contends that gross receipts from the sale were not subject to taxation under the law by reason of the prohibition of the federal Constitution that "No State shall * * * lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's (its) Inspection Laws." (Art. I, §10, cl. 2.) Defendant contends, on the other hand, that the sale of oil preceded its exportation and consequently was a local transaction subject to state taxation. It further contends that even if the oil attained the status of an export prior to the sale, the "export-import" clause of the Constitution does not prohibit the imposition of a sales tax based on that transaction.

It is admittedly difficult to ascertain the precise point at which the products of a state which are exported to foreign countries cease to be a part of the general mass of property of that state, subject to nondiscriminatory taxation as such, and become "exports" entitled to the constitutional protection against the imposition of taxes or duties. Clearly, [fol. 117] goods not intended for export when a general tax is laid on all property alike, are not exempt therefrom because they happen to be exported afterwards. (Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257.) And,

goods are not exempt from such taxation merely because they are intended for exportation or manufactured under a contract for export. (Turpin v. Burgess, 117 U. S. 504, 6 S. Ct. 835, 29 L. Ed. 988; Cornell v. Coyne, 192 U. S. 418, 24 S. Ct. 383, 48 L. Ed. 504.) On the other hand, goods in the actual course of transportation to a foreign destination and goods delivered to a common carrier for that purpose are in the process of exportation and constitutionally cannot be taxed. (Spalding & Bros. v. Edwards, 262 U. S. 66, 43 S. Ct. 485, 67 L. Ed. 865; see Pock & Co. v. Lowe, 247 U. S. 165, 175, 38 S. Ct. 432, 62 L. Ed. 1049; Turpin v. Burgess, supra, 117 U. S. at page 506, 6 S. Ct. 835, 29 L. Ed. 988; Coe v. Errol, 116 U. S. 517, 527, 6 S. Ct. 475, 478, 29 L. Ed. 715.) It was said in Coe v. Errol, supra, that goods exported to a foreign country do not cease to be part of the common property of the state of their origin for tax purposes until they "have been shipped or entered with a common carrier for transportation * * * or have been started upon such transportation in a continuous route or journey." (Cf. Railroad Commission v. Texas & P. R. Co., 229 U. S. 336, 33 S. Ct. 837, 57 L. Ed. 1215; Texas & N. O. R. [fol. 118] Co. v. Sabine Tram Co., 227 U. S. 111, 33 S. Ct. 229, 57 L. Ed. 442; Southern P. Terminal Co. v. Interstate Commerce Comm., 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310.)

Applying these general principles or formulas to the facts of the present case, we are of the opinion that the sale of oil was a step in its exportation and that the tax in question was improperly levied. The case of A. G. Spalding & Bros. v. Edwards, supra, is substantially on all fours with the present case and the decision of the United States Supreme Court therein is, of course, controlling. In that case, Delgado & Compania, a Venezuelan firm, requested New York commission merchants to buy certain sporting goods for their account. The commission merchants ordered the goods from the plaintiff, instructing it to deliver the same to a specified exporting carrier in New York addressed to Delgado & Compania. The plaintiff delivered the goods as directed and received a receipt from the carrier which it sent to the commission merchants, who exchanged it for a bill of lading in their own name. The commission merchants paid plaintiff and in due time the goods were transported and delivered to Delgado & Compania in Venezuela. In holding that a tax based on that sale could

not constitutionally be imposed upon plaintiff, the court stated, 262 U. S. at page 69, 43 S. Ct. at page 486, 67 L. Ed. 865, in language equally applicable to the case at bar, "The [fol. 119] very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port."

It is true that the Spalding case involved section 9, clause 5 of the Constitution, which prohibits Congress from laying taxes on articles exported from any state, rather than section 10, clause 2, but it has been repeatedly said that the prohibitions of those sections are identical. (Turpin v. Burgess, 117 U. S. 504, 506, 6 S. Ct. 835, 29 L. Ed. 988; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, 687.) Defendant seeks to distinguish the case, however, on the ground that while delivery therein was to a common carrier, delivery in the present case was to the purchaser's carrier. The distinction is one of form rather than substance. Delivery of goods to a common carrier for transportation is regarded as the beginning of the export journey because the destination of the goods is thereby fixed and certain. (Cf. Turpin v. Burgess, supra, 117 U. S. at page 507, 6 S. Ct. 835, 29 L. Ed. 988; Superior Oil Co. v. Mississippi, 280 U. S. 390, 396, 50 S. Ct. 169, 74 L. Ed. 504; Coe v. Errol, 116 U. S. 517, 527, 6 S. Ct. 475, 29 L. Ed. 715.) [fol. 120] But delivery of the oil to the "Nucula" in this case as effectively fixed its destination as did the delivery of the Goods to the common carrier in the Spalding case. Here, as there, title passed upon delivery, and the passage of title enables the purchaser to change the destination of the goods and thereby evade the tax. But, as stated in A. G. Spalding & Bros. v. Edwards, supra, 262 U. S. at page 70, 43 S. Ct. at page 486, 67 L. Ed. 865, "There was not the slightest probability of any such change and it did not occur," and "theoretical possibilities may be left out of account."

The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. The means selected in this case, in the light of all the circumstances, satisfies that inquiry. The transaction in issue featured a contract negotiated and

entered into in New Zealand for the sale of fuel oil to supply foreign needs. Under that contract plaintiff was obligated to deliver the oil to the order of "Naval Secretary, Navy Office, Wellington" into the tanker "Nucula" at Long Beach, furnish the master of the tanker with customary shipping documents, including a bill of lading consigning the oil to the "Naval-Officer-In-Charge, Auckland, New Zealand," and advance a sum equal to £300 to the master [fol. 121] to meet disbursements at the port of loading. Plaintiff performed the obligations of its contract. It also executed an export declaration, and, as provided in the contract, received payment for the oil in London, England. From the inception of negotiations the parties contemplated an exportation of oil, and the oil was in fact exported to New Zealand. The only local phase of the sale was the delivery to the carrier in this state, and that delivery was the first step in the exportation. As stated in A. G. Spalding & Bros. v. Edwards, supra, 262 U. S. at page 70, 43 S. Ct. at page 486, 67 L. Ed. 865, "To put it at any later point would fail to give to exports the liberal protection that hitherto they have received."

The present case is even stronger than the Spalding case, for whereas here, the alleged local transaction was a direct sale to the foreign consumer and the oil was actually loaded aboard the carrier, the sale in the Spalding case was to an intermediary and the goods were merely delivered to the carrier.

Defendant argues that unless the Spalding case is distinguished or overruled an anomalous situation will exist in that the sale in the present case would have been taxable had the oil been intended for and transported in interstate commerce. It cites Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188; Superior Oil Co. v. Mississippi, 280 U. S. [fol. 122] 390, 50 S. Ct. 169, 74 L. Ed. 504; and Standard Oil Co. v. Johnson, 56 Cal. App. 2d 411, 132 P. 2d 910, in support of the constitutionality of such a tax under the commerce clause. While a few cases have suggested that the prohibitions of the commerce and export-import clauses of the Constitution are substantially identical insofar as taxation is concerned (Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 295, 38 S. Ct. 126, 62 L. Ed. 295; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678), other cases have rejected even an analogy between the two. (Sonneborn

Bros. v. Cureton, 262 U. S. 505, 43 S. Ct. 643, 67 L. Ed. 1095 (refusing to apply original package doctrine to sales of articles transported in interstate commerce); Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382; cf. Fairbank v. United States, 181 U. S. 283, 306, 21 S. Ct. 648, 45 L. Ed. 862.) And, in two of the three cases involving the commerce clause cited by defendant, the Spalding case was expressly distinguished on the ground that it involved the export-import clause of the Constitution. (Superior Oil Co. v. Mississippi, supra; Standard Oil Co. v. Johnson, supra.) The distinction thus drawn between cases involving exports and cases dealing with interstate commerce is not without basis. Section 10, clause 2 in terms prohibits state taxation of exports, while section 8, clause 3 merely commits the regulation of commerce to the federal government. Modern [fol. 123] authorities recognize that those engaged in interstate commerce must pay their just share of state tax burdens, and that a state tax infringes the authority of Congress over interstate commerce only when it discriminates against or directly burdens such commerce. (McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876.) Defendant itself asserts that under the commerce clause "The question of where interstate or foreign commerce begins is wholly separate and apart from the question of what events occurring within a state are taxable."

Defendant advances two arguments in support of the contention that the tax imposed in the present case, although based upon gross receipts from the sale of oil in the process of exportation, does not violate article I, section 10, clause 2 of the Constitution: First, the tax is one imposed on retailers for the privilege of selling and is not an "impost" or "duty" on exports within the meaning of the constitutional prohibition. Second, the constitutional prohibition against state taxation of exports does not apply to exports orginating in the taxing state. In our opinion, neither argument is sound.

In the early case of Brown v. Maryland, 12 Wheat. 419, 444, 6 L. Ed. 678, 687, where the state argued that a license tax on importers did not contravene article I, section 10, clause 2 since it was a tax on the person rather than the [fol. 124] article, the Supreme Court said: "It is impossible, to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibi-

tion which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that, a tax on the sale of an article * * * is a tax on the article itself. * * * So, a tax on the occupation of an importer is * * * a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made." By way of dictum the court announced that a license tax on exporters would likewise contravene the prohibitions of the Constitution. And in the more recent case of Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295, it was expressly held that a state license tax on wholesale venders of merchandise, measured by gross receipts, is in effect an impost on exports when applied to merchandise sold and shipped to customers in foreign countries. (Cf. United States v. Hvoslef, 237 U. S. 1, 35 S. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286; Fairbank v. United States, 181 U. S. 283, 21 S. Ct. 648, 45 L. Ed. 862.)

The case of Crew-Levick Co. v. Pennsylvania, supra, is also authority for the proposition that the constitutional protection of exports is not limited to exports originating [fol. 125] outside the taxing state. There, the State of Pennsylvania unsuccessfully sought to tax exports originating in that state. While it may be conceded that article I, section 10, clause 2 was conceived in the desire to prevent the seaboard states from exacting tribute from their sister states (see Cook v. Pennsylvania, 97 U. S. 566, 574, 24 L. Ed. 1015; Woodruff v. Parham, 8 Wall. 123, 134, 135, 75 U. S. 123, 134, 135, 19 L. Ed. 382), the prohibition is general in its terms. As stated in Blount v. Monroe, 60 Ga. 61, 67, "The constitution does not prescribe that no state shall levy such a tax on exports of articles brought from other states to her seaport towns, but simply and without exception, it lays the ban of prohibition upon all exports."

The judgment is affirmed.

Shenk, Curtis, Edmonds, and Schauer, J. J., concurred.

Traynor, J., did not participate therein.

DISSENTING OPINION

CARTER, Justice (dissenting):

I dissent. In arriving at the conclusion that the plaintiff is exempt from the payment of sales tax upon the transaction in controversy, the majority of this court has ignored the more recent cases decided by the United States Supreme Court, and has based its decision upon what may be termed the old approach as applied to interestate and foreign commerce. Under that approach a state is entirely in-
[fol. 126] hibited from coming into contact with that commerce through its taxing power. On the other hand, cases decided by the United States Supreme Court since 1937 signify a new approach, whereby complete immunity from various state taxes which resulted from the earlier doctrine has been repudiated. (See Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944; J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429; Gwin, White & Prince, Inc., v. Henneford, 305 U. S. 434, 59 S. Ct. 325, 83 L. Ed. 272; McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876; Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229; Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188.) The essence of these decisions is recognition that not all state taxation is to be condemned because, in some manner, it has an effect upon interstate commerce, and recognition that there may be local activities by a taxpayer within a state, which may be sufficient to support a tax indepent of the character of the transaction as a whole, and though the tax may have some incidental effect on other than the purely local or intrastate aspects of that commerce.

[fol. 127] In McGoldrick v. Berwind-White Coal Min. Co., supra, a New York City tax upon the sale of goods for consumption was upheld as applied to a Pennsylvania corporation engaged in the production of coal in Pennsylvania and delivered by it to customers in New York. The tax was held to be conditioned upon events occurring within the state—delivery or the transfer of title or possession. It was said that not all state taxation is to be condemned because, in some manner, it has an effect upon commerce, and it is only when the tax operates to regulate commerce

between the states or foreign nations to an extent that infringes the authority of Congress that the tax can be said to exceed constitutional limitations.

In Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 250, 85 L. Ed. 267, 130 A. L. R. 1229, a tax on a foreign corporation's privilege of doing business was sustained. Liability was not imposed until the declaration of dividends payable to out-of-state stockholders. The court stated that, "The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is [fol. 128] contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

In Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188, the Indiana Gross Income Tax Act of 1933, c. 50, was upheld as applied to a foreign corporation engaged in the business of purchasing railroad ties and selling them to purchasers with whom it had a contract for treating the ties by creosoting them. As to the dealings in question it appeared that the taxpayer purchased and received the ties from local producers in Indiana and sold them to the Baltimore & Ohio Railroad Company, making delivery f. o. b. cars on the railroad tracks in Indiana, pursuant to contract. The ties were then forthwith transported to Ohio for treatment. It was held that the tax was predicated upon local transactions which were none the less intrastate because the ties were intended for interstate shipment. It was pointed out that the taxpayer did not pay the freight for the transportation and that there was a completed delivery to the railroad company in Indiana. J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429, which arose under the same taxing act of Indiana, was distinguished. There the tax was laid upon receipts from sales where delivery was made to customers in other states and abroad.

[fol. 129] The California sales tax here under discussion has been held applicable to a sale of petroleum products

within the state to purchasers intending to transport the products out of state. Standard Oil Co. v. Johnson, 56 Cal. App. 2d 411, 132 P. 2d 910. In that case delivery of some of the items was made f. o. b. the purchasers tank cars. See, also, O'Kane v. State, 283 N. Y. 439, 28 N. E. 2d 905, and Trotwood Trailers v. Evatt, 142 Ohio St. 197, 51 N. E. 2d 645, upholding the validity of similar taxes, based upon local transactions prior to interstate transportation.

While all of the foregoing cases involved interstate commerce, and no case has arisen wholly concerned with foreign commerce since the advent of the modern view, yet those cases are authority in the field of foreign commerce, for the destination has no effect on the character of acts completed in a state. Otherwise the anomalous situation exists, that an act which is local if done where goods are intended for interstate commerce, is not local if done where goods are intended for foreign commerce, and California must accord a discriminatory favor to purchasers of commodities which go to a foreign country instead of a sister state or intrastate. If the imposition of a nondiscriminatory tax upon the privilege of selling, such as is the California sales tax, conditioned upon a sale and the passing of title by delivery [fol. 130] within the borders of the state is not a regulation of commerce, nor a burden thereon, forbidden by article I, section 8, clause 3 of the federal Constitution, then it must follow as a matter of course that it is not an "impost" or "duty" on exports within the meaning of article I, section 10, clause 2 of that Constitution. It is to be noted that we do not have before us any form of direct tax on goods intended for export, or on the privilege of exporting, and the tax is not measured in terms of export or import. The California Retail Sales Tax is a general excise tax on the privilege of selling, a distinctly local activity, as distinguished from a personal property tax or a tax on the sale or because of the sale. Western Lithograph Co. v. State Board of Equalization, 11 Cal. 2d 156, 78 P. 2d 731, 117 A. L. R. 838; Roth Drug, Inc., v. Johnson, 13 Cal. App. 2d 720, 57 P. 2d 1022. To export is to send merchandise from one country to a foreign country. Exportation is the act of sending or carrying merchandise from one country to another. (1 Bouv. Law Dict., Rawle's Third Revision, p. 1161; Black, Law Dictionary.) An export tax falls upon the one who takes the goods out of the country. Krauter

v. Menchacatorre, 202 App. Div. 200, 195 N. Y. S. 361. In Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 1095, 29 L. Ed. 257, the court said, "A duty on exports must either be a duty levied on goods as a condition, or by reason of [fol. 131] their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine." The California Retail Sales Tax is neither of these. The act of exportation in the case at bar is an immaterial consequence, subsequent to the occurrence of the taxable event, to wit: the transference of title and possession by delivery within the borders of this state. The mere fact that the goods were delivered on board a ship instead of inland to the purchaser does not transmute the fundamental nature of the tax. Furthermore, constitutional history discloses that the primary intent and purpose of article I, section 10, clause 2, was to prevent the seaboard states from benefiting, because of their location, at the expense and to the detriment of the remainder of the states. This much the majority opinion concedes. It was not intended to prevent the imposition of general taxes upon local privileges merely because goods were to be exported. Woodruff v. Parham, 8 Wall. 123, 134, 19 L. Ed. 382; The Federalist, No. 42; Story, Constitution, p. 714 (4th ed.); Warren, Making of the Constitution, p. 557. However, as pointed out in the majority opinion, the prohibition not being limited in terms has been applied to exports originating in the seaboard states. Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295. But the [fol. 132] attitude of the United States Supreme Court, now recognizing the definitely local attributes of transactions also having foreign consequences, and the right of the states to deal therewith, makes possible more nearly the attainment of the original purposes of the constitutional provision, by preserving the right of the states to impose general taxes not aimed at foreign commerce, even though a state may still be prohibited from directly levying upon its own exports by virtue of the broad terms of the clause.

The majority opinion in reaching a contrary result relies principally upon the case of A. G. Spalding & Bros. v. Edwards, 262 U. S. 66, 43 S. Ct. 485, 67 L. Ed. 865. That case decided back in 1923 is distinguishable in a number of its aspects from the case at bar. The tax was not conditioned upon any local activity of the taxpayer or the

consummation of any transaction within a state. It was not imposed by a state government but by the federal government itself, and was an excise tax upon the goods themselves. It was vitiated under article I, section 9, clause 5 of the Constitution. Further, delivery of the merchandise was made by the taxpayer to a common carrier which in turn transported the goods to the purchaser in a foreign port. In the case at bar the purchaser came to this country, received the goods and was thereafter free to take them wherever it chose.

[fol. 133] In rejecting appellant's contention that the tax imposed in the case at bar is one imposed on retailers for the privilege of selling, and is not an "impost" or "duty" on exports within the meaning of the constitutional prohibition, the majority opinion cites Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, and Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295, both of which dealt with license taxes upon importers. In the former case the tax in the form of a license actually and potentially discriminated against domestic products or dealers therein, and in the latter case the tax was measured by gross receipts from sales and not conditioned upon the exercise of the taxpayer's franchise or any other local privilege. Cf. J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 310, 312, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429; McGoldrick v. Berwind-White Coal Min. Co., supra, 309 U. S. at pages 57, 58, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876. A $3.00 imposition upon wholesale vendors doing business within the state in both internal and foreign commerce was not questioned. It was similarly urged in McGoldrick v. Berwind-White Coal Min. Co., supra, that the conclusion there reached was inconsistent with the line of decisions following Robbins v. Taxing Dist. of Shelby County, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting orders for the [fol. 134] purchase of goods to be shipped into the taxing state. It was noted that in some instances these taxes were aimed at suppression or placing at a disadvantage interstate business in favor of intrastate sales and otherwise these cases were tacitly disapproved, the court deeming it sufficient to say that the rule of Robbins v. Taxing District of Shelby County, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, had been narrowly limited to fixed-sum license taxes im-

posed on the business of soliciting orders for the purchase of goods to be shipped interstate and that the effect on commerce of such a tax was wholly wanting in the present case.

It follows from the foregoing considerations that I cannot agree with my associates in holding that the California Retail Sales Tax on the privilege of selling, which is accomplished within the state, and is nondiscriminatory in its elements, in an "impost" or "duty" within the purview of article I, section 10, clause 2, of the Constitution. Included in such a tax is no evil which the framers of the Constitution could be supposed to have intended to prevent. They were concerned with taxes which might be imposed because of the foreign character of the goods or resulting in the exaction of tribute because of that character. Woodruff v. Parham, supra; Cook v. Pennsylvania, 97 U. S. 566, 574, 24 [fol. 135] L. Ed. 1015. To otherwise hold is to disregard the underlying concept of the late cases reviewed herein, recognizing that transactions completed wholly within a state may be so related to privileges which the state is authorized to grant or deny as to warrant sustaining of their existence solely because of such relationship.

To my mind, it is perfectly absurd to say that the framers of the Constitution of the United States ever contemplated the proscription of such a tax, and it requires a most conservative and strained interpretation of its provisions to arrive at the conclusion reached in the majority opinion.

Simply stated, we have a situation where a product—"oil"—was produced, refined and stored, and finally sold and delivered by plaintiff to a purchaser in California. The plaintiff as such producer has enjoyed the privilege of doing business in California, the protection of its laws, and the service of its governmental agencies. It now seeks to evade the payment of a purely nondiscriminatory excise tax on the privilege of selling its products, under the specious argument that because it is selling such products to a foreign government for foreign consumption, such tax amounts to an impost or duty on exports and is invalid as being a contravention of article I, section 10, clause 2, of the Constitution of the United States. I say without fear of refutation that no court in this country has ever held [fol. 136] such a tax invalid under the factual situation here related. It is the modern concept that the tax burden

should be distributed in accordance with the benefits received and the ability of the taxpayer to pay, but under the majority decision in this case the plaintiff is escaping its fair share of the tax burden of this state, which means the shifting of its share of such burden to other taxpayers. Furthermore, the effect of this decision will be to permit the oil companies of this state to recover from the state all of the sales taxes which they paid on the huge quantities of oil sold by them to Japan prior to Pearl Harbor, if they have protected their right to such recovery, as I presume they have. Such recovery will no doubt amount to millions of dollars and will have a serious effect upon the revenues of the state. It seems clear to me that such a result should not be reached in the absence of a clear and positive constitutional mandate which is not present in this case.

In my opinion, the judgment should be reversed.

[fol. 137] IN THE SUPREME COURT OF CALIFORNIA, IN BANK

[Title omitted]

ORDER GRANTING REHEARING—Filed January 29, 1945

Appellant's petition for rehearing Granted.

Dated Jan. 29, 1945.

Shenk, Justice; Carter, Justice; Schauer, Justice and Spence, Justice.

[File endorsement omitted.]

[fol. 138] IN SUPREME COURT OF CALIFORNIA

OPINION—November 1, 1945

(Second and final decision)

CARTER, J.:

This is an appeal from a judgment for plaintiff in an action to recover retail sales tax paid under protest.

Plaintiff, a corporation, is engaged in producing and selling oil and oil products in California. The New Zealand

Government for use by its navy invited offers to sell oil to it for delivery "f.o.b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer." Plaintiff, in the course of its business, submitted an offer with the price quoted f.o.b. ship's rail of buyer's tanker at its storage terminal at Long Beach, California. Pursuant thereto a contract of sale was executed specifying that "(1) Price * * * f. o. b. Los Angeles, payment in London, * * * (3) Delivery shall be given to the order of the Naval Secretary, Navy Office, Wellington, *into* N. Z. *Naval tank steamer* R. F. A. 'Nucula' *at Los Angeles, California.* * * *

"(7) The Richfield Oil Co. shall advance to the Master of the 'Nucula' at Los Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading on each trip, such advance to be repaid when payment is made for the fuel oil.

"(8) Bills of Lading and other customary shipping documents shall be handed to the Master of the 'Nucula' and the oil consigned to the Naval-Officer-In-Charge, Auckland, [fol. 139] New Zealand."

Pursuant to the contract plaintiff delivered oil from its storage tanks into the "Nucula" at Long Beach, California. Documents including a bill of lading naming plaintiff as shipper and stating that delivery would be made to the naval officer at Auckland, New Zealand, were delivered to the master of the vessel. Plaintiff also executed a shipper's export declaration, naming it as shipper. The oil reached New Zealand and was paid for in London. It is conceded that title to the oil passed to the buyer when plaintiff delivered it into the tanker at Long Beach, California.

The trial court found the following facts in addition to the foregoing: That oil had never been produced in New Zealand in sufficient quantities for that country's needs, and plaintiff had made other sales of oil to the buyer under similar circumstances; that the parties intended that the oil would be exported to the buyer without interruption.

Clearly, the sale here involved, falls within the provision of the California sales tax law. It levies a tax, measured by gross receipts, on retailers "for the privilege of selling tangible personal property at retail * * *." (Rev. & Tax. Code, §§ 6051, 6052.) The retailers are authorized

to collect the tax from the consumers. (Rev. & Tax. Code, §§ 6051, 6052.) A sale is "any transfer of title or posses-
[fol. 140] sion, * * * in any manner or by any means whatsoever, of tangible personal property for a consideration, * * *." (Rev. & Tax. Code, § 6006.) In the present case the transfer of possession and title took place in California.

In construing the above statutory provisions it has been definitely and squarely held by the courts of this state that:

"The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales." (*Western L. Co.* v. *State Board of Equalization*, 11 Cal. 2d 156, 164 (78 P. 2d 731, 117 A. L. R. 838); see also *National Ice etc. Co.* v. *Pacific F. Exp. Co.*, 11 Cal. 2d 283 (79 P. 2d 380); *De Arjan* v. *Akers*, 12 Cal. 2d 781 (87 P. 2d 695); *Standard Oil Co.* v. *Johnson*, 10 Cal. 2d 758 (76 P. 2d 1184); *Roth Drug Inc.* v. *Johnson*, 13 Cal. App. 2d 720 (57 P. 2d 1022).)

Plaintiff invokes the Constitution of the United States as a bar to the collection of the tax. "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States * * *," (U. S. Const., [fol. 141] art. I, § 8, cl. 3). "No Tax or Duty shall be laid on Articles exported from any State." (U. S. Const., art. I, § 9, cl. 5.) "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such laws shall be subject to the Revision and Control of the Congress." (U. S. Const., art. I, § 10, cl. 2.)

It should be clear that the sales tax imposed in the instant case does not violate the United States Constitution. There is no discrimination penalizing the sale of goods that are exported to the advantage of sales in local or intrastate transactions. The tax falls equally on all transactions without distinction. The tax is not on export business as

such nor on the articles in export. Thus, the only theory upon which it may be said that the tax cannot be applied here is, that the property had already been launched upon its export journey when the sale was consummated and the tax attached to the sale, or, stated another way, the sale was an inseparable part of the exportation and therefore could not be subject to the tax. But here the delivery of the oil which resulted in the passage of title, and the completion of the sale, and the taxable incident, occurred [fol. 142] prior to the commencement of the exportation. The delivery of the oil was to the buyer's vessel not a common carrier. The vessel was in California waters and was not bound for any destination until it started to move from the port. It became the property of the buyer before any movement in the channels of commerce occurred. If it had been delivered to a common carrier of export products a different result might be appropriate, for then it would have been placed in the hands of an instrumentality whose *sole purpose* is to export goods, thus indelibly characterterizing the process as a part of exportation. Suppose a citizen of Mexico entered this country and purchased a banjo in a store a mile from the border with the unequivocal intent to take it back to Mexico with him and he did so. Would it be doubted that the retailer would be required to pay a tax on the sale? Would the result be any different if the Mexican came by his automobile and either he or the retailer for him placed the banjo in the car? Nor would the conclusion be altered if he gave the retailer an affidavit that he was taking the banjo to Mexico.

When a general tax is levied on all property alike, goods not intended for export are not immune because they are later exported. (*Brown v. Houston*, 114 U. S. 622 (5 S. Ct. 1091, 29 L. Ed. 257).) Nor are goods exempt from such tax on the ground that they are intended for exportation or manufactured under a contract for export. (*Turpin v.* [fol. 143] *Burgess*, 117 U. S. 504 (6 S. Ct. 835, 29 L. Ed. 988); *Cornell v. Coyne*, 192 U. S. 418 (24 S. Ct. 383, 48 L. Ed. 504.) It has been said that goods exported to a foreign country do not lose their character as a part of the common mass of property in the state from which exported "until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." (*Coe v. Errol*, 116 U. S. 517, 527 (6 S. Ct. 475, 29 L. Ed.

715).) And also that " 'Whenever a commodity has *begun to move* as an article of trade from one State to another, commerce in that commodity between the States has commenced.' " But *this movement does not begin until the articles have been shipped or started for transportation* from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain." (Emphasis added.) (*Coe v. Errol*, supra, 528.)

The cases of *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865), and *Crew-Levick Co.* [fol. 144] *v. Pennsylvania*, 245 U. S. 292 (38 S. Ct. 126, 62 L. Ed. 295), do not compel a different result. In the Spalding case the property had commenced its journey by being committed to a common carrier, an instrumentality whose sole function is transportation in commerce. Hence, when it was delivered to the carrier the process of exportation had begun. In any event both the Spalding case and the Crew-Levick case must be considered as expressing narrow views with reference to the field of state taxation which have been superseded by the recent decisions of the United States Supreme Court. In that connection it should be noted that in the Crew-Levick case, the argument was based upon both the ban against state imposition of imposts on exports and the power over foreign commerce, yet the court treated the case as a proper one for applying the rules applicable to state taxes where interstate commerce is involved. The court stated: "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, * * * is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms." (*Crew-Levick Co. v. Pennsylvania, supra*, [fol. 145] 295.). And after discussing authorities dealing

with interstate commerce, it is said: "Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned." (*Crew-Levick Co. v. Pennsylvania, supra,* 296; see also *Brown v. Maryland,* 12 Wheat. (U. S.) 419 (6 L. Ed. 678); but see *Sonneborn Bros. v. Cureton,* 262 U. S. 506 (43 S. Ct. 643. 67 L. Ed. 1095).)

The new approach to the problem of the collision between state taxation and interstate commerce has been developed in many authorities. (See *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250 (58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944); *J. D. Adams Mfg. Co. v. Storen;* 304 U. S. 307 (58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429); *Gwin, White & Prince, Inc. v. Henneford,* 305 U. S. 434 (59 S. Ct. 325, 83 L. Ed. 272); *McGoldrick v. Berwind-White Coal Min. Co.,* 309 U. S. 33 (60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876); *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435 (61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229); *Department of Treasury v. Wood Preserving Corp.,* 313 U. S. 62 (61 S. Ct. 885, 85 L. Ed. 1188); *International Harvester Co. v. Dept. of Treasury,* 322 U. S. 340 (64 S. Ct. 1019, 1030, 88 L. Ed. 1313); *McLeod v. J. E. Dilworth Co.,* 322 U. S. 327, 349 (64 S. Ct. 1023, 1030, 88 L. Ed. 1304, 1319); *General Trading Co. v. Tax Com.,* 322 U. S. 335 (64 S. Ct. 1028, 88 L. Ed. 1309).) The essence of these [fol. 146] decisions is recognition that not all state taxation is to be condemned because, in some manner, it has an effect upon interstate commerce, and recognition that there may be local activities by a taxpayer within a state, which may be sufficient to support a tax independent of the character of the transaction as a whole, and though the tax may have some incidental effect on other than the purely local or intrastate aspects of that commerce. For illustration in *McGoldrick v. Berwind-White Min. Co., supra,* a New York City tax upon the sale of goods for consumption was upheld as applied where a Pennsylvania corporation engaged in the production of coal in Pennsylvania delivered it to its customers in New York. The tax was held to be conditioned upon events occurring within the state—delivery or the transfer of title or possession. It was said that not all state taxation is to be condemned because, in some manner, it has an effect upon commerce, and it is only when the tax operates to regulate commerce between the states to

an extent that infringes the authority of Congress that the tax can be said to exceed constitutional limitations.

In *Department of Treasury v. Wood Preserving Corp.*, 313 U. S. 62 (61 S. Ct. 885, 85 L. Ed. 1188), the Indiana Gross Income Tax Act of 1933 was upheld as applied to a foreign corporation engaged in the business of purchasing railroad ties and selling them to purchasers with whom it [fol. 147] had a contract for treating the ties by creosoting them. As to the dealings in question it appeared that the taxpayer purchased and received the ties from local producers in Indiana and sold them to the Baltimore & Ohio Railroad Company, making delivery f. o. b. cars on the railroad tracks in Indiana, pursuant to contract. The ties were then forthwith transported to Ohio for treatment. It was held that the tax was predicated upon local transactions, which were none the less intrastate because the ties were intended for interstate shipment. It was pointed out that the taxpayer did not pay the freight for the transportation and that there was a completed delivery to the railroad company in Indiana.

General Trading Co. v. Tax Com., supra, involved an Iowa use tax. A sale of property was made in Minnesota to Iowa customers, the contract of sale being completed in Minnesota and the goods delivered to a common carrier there for shipment to Iowa.

The case of *International Harvester Co. v. Dept. of Treasury, supra*, concerned an Indiana tax levied on gross receipts from sales, particularly dealing with "(1) sales by out-of-State branches to Indiana dealers and users, where delivery is taken at plants of the corporation in Indiana; (2) sales to out-of-State buyers who come to Indiana, take delivery there, and transport the goods to another State; (3) sales in Indiana to Indiana buyers, where [fol. 148] the goods are shipped from out-of-State points to the buyer." (322 U. S. 340.)

Under the foregoing authorities it is perfectly clear that had this been an interstate transaction it would have been subject to tax. It is inconceivable that the framers of the Constitution ever intended that the export-import clause should be used to discriminate against the states.

Reference is made to *Hooven & Allison Co. v. Evatt*,— U. S. — (65 S. Ct. 870, — L. Ed. —) where Ohio sought to tax property imported by the taxpayer from the Philippine Islands while it was still in its original package and was

held by the importer for manufacture. It was held not taxable but the court was particularly concerned with the original package doctrine and by applying it concluded that the importation had not ended. In the instant case the export had not begun and we have no question of the invocation of that doctrine. Moreover, it is difficult to ascertain the precise holding of that case inasmuch as the opinion written by Mr. Chief Justice Stone, held two things: (1) That the shipment from the Philippine Islands was an import because that territory was not a part of this country and hence the provision against imposts on imports applied, and; (2) That the property was not taxable under that provision. Justices Black, Douglas, Rutledge and Murphy [fol. 149] dissented on the second point. Although Mr. Justice Reed apparently joined in the judgment reversing the state court's conclusion of taxability, he dissents on the first issue and his reasoning is of the character generally found in discussions as to the validity of state taxes where interstate commerce is involved.

In the instant case the tax imposed was a uniform nondiscriminatory excise tax on the privilege of doing business in this state. The transactions which was the basis for the tax was the sale of oil which was produced, refined, stored and delivered to the purchaser in this state. The tax imposed was in no sense a tax on exports and became effective before the oil started on its export journey. For these reasons it is clear that the tax was not imposed in violation of any of the provisions of the Constitution of the United States, and is therefore valid.

The judgment is reversed.

Shenk, J., Schauer, J., Spence, J., and Peters, J., pro tem, concurred.

DISSENTING OPINION

Gibson, C. J.—I dissent.

Under the prevailing decisions of the United States Supreme Court the tax imposed in the present case is prohibited by the "import-export" clause of the Constitution of the United States which provides that "No State shall * * * lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its [fol. 150] inspection Laws * * *." (Art. I, § 10, cl. 2.)

Since the question is entirely one of federal law, we are bound by those decisions.

It is admittedly difficult to ascertain the precise point at which the products of a state which are exported to foreign countries cease to be a part of the general mass of property of that state, subject to nondiscriminatory taxation as such, and become "exports" entitled to the constitutional protection against the imposition of taxes or duties. Clearly, where a general tax is laid on all property alike, goods not then intended for export are not exempt because they happen to be exported afterwards. (Brown v. Houston, 114 U. S. 622 (5 S. Ct. 1091, 29 L. Ed. 257).) And, goods are not exempt from such taxation merely because they are intended for exportation or manufactured under a contract for export. (*Turpin v. Burgess*, 117 U. S. 504 (6 S. Ct. 835, 29 L. Ed. 988); *Cornell v. Coyne*, 192 U. S. [illegible] (24 S. Ct. 383, 48 L. Ed. 504).) On the other hand, goods [illegible] the actual course of transportation to a foreign d[illegible] goods delivered to a common carrier for tha[illegible] in the process of exportation and constitutionally [illegible] taxed. (*A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865); see *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 175 (38 S. Ct. 432, 62 L. Ed. 1049); *Turpin v. Burgess, supra*, at p. 506; Coe v. Errol, 116 U. S. [fol. 151] 517, 527 (6 S. Ct. 475, 29 L. Ed. 715.) It was said in *Coe v. Errol*, supra, that goods exported to a foreign country do not cease to be part of the common property of the state of their origin for tax purposes until they "have been shipped or entered with a common carrier for transportation * * * or have been started upon such transportation in a continuous route or journey." (*Cf. Railroad Commission v. Texas & P. Ry. Co.*, 229 U. S. 336 (33 S. Ct. 837, 57 L. Ed. 1215); *Texas & N. O. R. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111 (33 S. Ct. 229, 57 L. Ed. 442); *Southern P. Terminal Co. v. Interstate Commerce Com.*, 219 U. S. 498 (31 S. Ct. 279, 55 L. Ed. 310).)

Applying these general principles or formulas to the facts of the present case, it seems reasonably clear that the sale of the oil, under terms requiring delivery to the ship of a foreign government, at which time title passed, was a step in its exportation. The case of *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865), is particularly pertinent here. In that case a Venezuelan firm requested New York commission merchants to buy certain

sporting goods for their account. The commission merchants ordered the goods from plaintiff Spalding, instructing it to deliver the same to a specified exporting carrier in New York addressed to the Venezuelan firm. The plaintiff delivered the goods as directed and received a receipt from [fol. 152] the carrier which it sent to the commission merchants, who exchanged it for a bill of lading in their own name. The commission merchants paid plaintiff and in due time the goods were transported and delivered to the firm in Venezuela. In holding that a tax based on that sale could not constitutionally be imposed upon plaintiff, the court stated, at page 69, in language equally applicable to the case at bar, "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port."

It is true that the Spalding case involved section 9, clause 5, of the Constitution, which prohibits Congress from laying taxes on articles exported from any state, rather than section 10, clause 2, but it has been repeatedly said that the prohibitions of those sections are identical. (*Turpin v. Burgess*, 117 U. S. 504, 506 (6 S. Ct. 835, 29 L. Ed. 988); *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (6 L. Ed. 678).) An effort is made to distinguish that case on the ground that the delivery there involved was to a common carrier, while the delivery in the present case was to the purchaser's carrier. This distinction is one of form rather than sub- [fol. 153] stance. Delivery of goods to a common carrier for transportation is regarded as the beginning of the export journey because the destination of the goods is thereby fixed and certain. (*Cf. Turpin v. Burgess, supra*, at p. 507; *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 396 (50 S. Ct. 169, 74 L. Ed. 504); *Coe v. Errol*, 116 U. S. 517, 527 (6 S. Ct. 475, 29 L. Ed. 715).) But delivery of the oil to the "Nucula" in this case as effectively fixed its destination as did the delivery of the goods to the common carrier in the Spalding case. Here, as there, title passed upon delivery, and the passage of title enables the purchaser to change the destination of goods and thereby evade the tax. But, as stated in the Spalding case "There was not the slightest probability of any such change and it did not occur," and "theo-

retical possibilities may be left out of account." (262 U. S. at p. 70.) The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. The means selected in this case, in light of all the circumstances, satisfies that inquiry. The only local phase of the sale was the delivery to the carrier in this state, and that delivery was the first step in the exportation. Under the Spalding case, to fix the step at which articles would be exempt from taxation "at any later point would fail to give the exports the liberal pro-[fol. 154] tection that hitherto they have received." (262 U. S. at p. 70.)

In some respects it would be more difficult to justify imposition of the tax in the present case than in the Spalding case because here the alleged local transaction was a direct sale to the foreign consumer and the oil was actually loaded aboard the carrier, whereas in the Spalding case the sale was to an intermediary and the goods were merely delivered to the carrier.

The contention that the constitutional prohibition against state taxation of exports does not apply to exports originating in taxing states is answered by the decision in *Crew-Levick Co. v. Pennsylavnia*, 245 U. S. 292 (38 S. Ct. 126, 62 L. Ed. 295), where the State of Pennsylvania unsuccessfully sought to tax exports originating in that state. While it may be conceded that article I, Section 10, clause 2, was conceived in the desire to prevent the seaboard states from exacting tribute from their sister states (see *Cook v. Pennsylvania*, 97 U. S. 566, 574 (24 L. Ed. 1015); *Woodruff v. Parham*, 8 Wall. (75 U. S.) 123, 134, 135 (19 L. Ed. 382)), the provision is general in its terms.

The prohibition of the federal Constitution, as interpreted by the United States Supreme Court, is not rendered inapplicable on the theory that the California statute levies the tax, not on the sales, but on the local business activities [fol. 155] of the seller, and that, therefore, the tax is not an "impost" or "duty" on exports. Although the formal subject of the tax is the "privilege of selling" (Cal. Rev. & Tax. Code, § 6051; see *Western L. Co. v. State Bd. of Equalization*, 11 Cal. 2d 156, 164 (78 P. 2d 731, 117 A. L. R. 838)), it is clear that the actual taxable event is the sale, or transfer of title or possession, and, in any event, the amount of the tax is expressly measured by gross receipts

from sales. (Rev. & Tax. Code, §§ 6006, 6007, 6051.) The United States Supreme Court has stated that in constitutional law cases the formal subject of a tax as declared by a state statute may be disregarded if the tax is in reality on something else, and it has held that taxes purporting to be on local business activities may be unconstitutional if they are in substance on interstate or foreign transactions. (See, for example, *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 439 (59 S. Ct. 325, 83 L. Ed. 272); *Crew-Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294 (38 S. Ct. 126, 62 L. Ed. 295).) In the Crew-Levick case the court said (p. 294) that "we * * * are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts." The court held that a Pennsylvania license tax of $3, together with "one-half mill additional on each dollar * * * of business transacted annually," [fol. 156] which in effect covered both local and foreign business, was unconstitutional because it "operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions (exporting merchandise)." (245 U. S. at p. 297.) In like manner, the California sales tax, measured by gross receipts from sales, cannot be applied to export sales since it would withhold "a part of every dollar received in such transactions."

In the early case of *Brown* v. *Maryland*, 12 Wheat. (U. S.) 419 (6 L. Ed. 678), where the state argued that a license tax on imports did not contravene article I, section 10, clause 2, since it was a tax on the person rather than the article, the Supreme Court said (at p. 444): "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article * * * is a tax on the article itself. * * * So, a tax on the occupation of an importer is * * * a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made." By way of dictum the court announced that a license tax on exporters would likewise contravene the

[fol. 157] prohibitions of the Constitution. And, in the more recent case of *Crew-Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (38 S. Ct. 126, 62 L. Ed. 295), it was expressly held that a state license tax on wholesale vendors of merchandise, measured by gross receipts, is in effect an impost on exports when applied to merchandise sold and shipped to customers in foreign countries. (*Cf. United States* v. *Hvoslef*, 237 U. S. 1 (35 S. Ct. 459, 59 L. Ed. 813); *Fairbank* v. *United States*, 181 U. S. 283 (21 S. Ct. 648, 45 L. Ed. 865).) Thus, to the extent that the so-called privilege tax is measured by gross receipts from exports, under the existing decisions of the United States Supreme Court it amounts to a tax on exports and is improper.

It is apparent, however, that a new approach has been taken with respect to the problem of state taxation in the field of interstate commerce, and that there are various local activities by a taxpayer within a state sufficient to support a nondiscriminatory tax although the tax may have some incidental effect on interstate commerce. Thus if the present case involved the commerce clause rather than the import-export clause of the federal Constitution, it may be that the tax could properly be imposed, since it falls equally without discrimination, upon all sales in the state, whether the goods are destined for local use or for export. In *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (61 S. Ct. 885, 85 L. Ed. [fol. 158] 1188), for example, an Indiana gross receipts tax was upheld although the goods were sold to an out-of-state buyer and, similar to the situation in the Spalding case, were delivered to a *common carrier* in the taxing state for transportation out of the state. It is somewhat difficult to reconcile these cases upon any other basis than that one concerned foreign commerce and the other interstate commerce.

It does not follow, however, that the views expressed in the Spalding and Crew-Levick cases with respect to imports and exports have been superseded by the interstate commerce decisions. The cases relate to different clauses of the Constitution and involve both different language and different purposes and policies. While a few cases have suggested that the prohibitions of the commerce and import-export clauses of the Constitution are substantially identical insofar as taxation is concerned

(*Crew-Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295 (38 S. Ct. 126, 62 L. Ed. 295); *Brown* v. *Maryland*, 12 Wheat. (U. S.) 419 (6 L. Ed. 678)), other cases have rejected even an analogy between the two. (*Sonneborn Bros.* v. *Cureton*, 262 U. S. 506 (43 S. Ct. 643, 67 L. Ed. 1095) (refusing to apply original package doctrine to sales of articles transported in interstate commerce); *Woodruff* v. *Parham*, 8 Wall. (75 U. S.) 123 (19 L. Ed. 382); cf. *Fairbank* v. *United States*, 181 U. S. 283, 306 (21 S. Ct. 648, 45 L. Ed. 862).)

[fol. 159] The latest decision of the United States Supreme Court involving state taxation of articles in foreign commerce expressly rejects the analogy of the interstate commerce cases. (*Hooven & Allison Co.* v. *Evatt*, —— U. S. —— (65 S. Ct. 870, 877, —— L. Ed. ——).) The state tax there held improper was a general, nondiscriminatory property tax. Although the United States Supreme Court thus had the opportunity to apply the reasoning of the interstate commerce cases, it did not do so, and, further, not even the dissenting opinion discussed the possibility of revising the older cases but, instead, relied upon a factual distinction. (See note (1945) 58 Harv. L. Rev. 858-876.) Until such time as that court determines to permit nondiscriminatory state taxation of sales made in foreign commerce, it would seem improper for a state court to give its approval to such a tax.

The judgment, therefore, should be affirmed.

Edmunds, J., concurred.

[fol. 160] IN THE SUPREME COURT OF CALIFORNIA,
SACRAMENTO

No. 5640

RICHFIELD OIL CORPORATION, a corporation, Plaintiff, Respondent

vs.

STATE BOARD OF EQUALIZATION, Defendant, Appellant

On Appeal from the Superior Court in and for the County of Sacramento.

JUDGMENT

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby reversed.

Appellant to recover costs on appeal.

I, A. V. Haskell, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 1st day of November, 1945, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 3rd day of December, A. D. 1945.

A. V. Haskell, Clerk, by L. F. White, Deputy. (Seal.)

[fol. 161] IN THE SUPREME COURT OF CALIFORNIA, IN BANK

[Title omitted]

ORDER DENYING REHEARING—Filed November 29, 1945

Respondent's petition for rehearing Denied.

Gibson, C. J., and Edmonds, J., voting for rehearing.

Dated Nov. 29, 1945.

Gibson, Chief Justice.

Traynor, J., did not participate herein.

[File endorsement omitted.]

[fol. 162] [File endorsement omitted.]

[fol. 163] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal, Assignments of Error, and Prayer for Reversal—Filed January 17, 1946

To the Honorable Phil S. Gibson, Chief Justice of the Supreme Court of the State of California:

Richfield Oil Corporation, a corporation, appellant and plaintiff in the above entitled cause, petitions and represents as follows:

The decision of the Supreme Court of the State of California in the above entitled cause was filed with the Clerk of said Court on November 1, 1945. On November 14, 1945, a petition for rehearing in said cause was duly presented and filed by appellant. On November 29, 1945, an order was made by the Supreme Court of the State of California in said cause denying said petition for rehearing.

[fol. 164] Considering itself aggrieved by the said final judgment of the Supreme Court of the State of California in the above entitled cause, said appellant, Richfield Oil Corporation, hereby prays that an appeal be allowed to the Supreme Court of the United States and for an order fixing the amount of bond.

ASSIGNMENTS OF ERROR

The said appellant, Richfield Oil Corporation, assigns the following errors in the record and proceedings in said cause:

(1) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in sustaining the validity of the California Retail Sales Tax Act of 1933, as amended, construed, applied and enforced to impose a tax upon the sale of fuel oil here involved, as against appellant's contention that said Act, so construed, applied and enforced, is invalid under Article I, section 10, clause 2, of the United States Constitution.

(2) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the California Retail Sales Tax Act of 1933, as amended, when construed and applied to impose a tax of 3% upon the sale of fuel oil to the New Zealand Government Stores Control Board for exportation to New Zealand, and which was so exported, is not invalid under and repugnant to the provisions of Article I, section 10, clause 2, [fol. 165] of the United States Constitution.

(3) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the tax levied upon and collected from appellant, Richfield Oil Corporation, pursuant to the California Retail Sales Tax Act of 1933, as amended, was not an impost or duty on exports in violation of or repugnant to or within the meaning of Article I, section 10, clause 2, of the United States Constitution.

(4) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that any event that, under Article I, section 10, clause 2 of the Constitution of the United States, may be taxed under the California Retail Sales Tax Act of 1933, as amended, occurred prior to the commencement of the exportation of the oil to New Zealand.

(5) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the delivery of the oil and the passage of title to the said oil to the purchaser occurred prior to the commencement of any exportation of said oil.

(6) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that no exportation of the oil commenced until the vessel "Nucula" started to New Zealand.

(7) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its deter- [fol. 166] mination that the transportation of the oil from appellant's refinery to its Marine Terminal, and the delivery of the oil from the storage tanks at the Marine Terminal to the vessel "Nucula," were not movements of the oil in exportation to New Zealand.

(8) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in failing to give consideration or effect to:

(a) The New Zealand Government Stores Control Board's invitation for tenders which stated that the oil was "required by the New Zealand Division of the Royal Navy * * * for delivery f. o. b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer."

(b) The provisions of the sales contract which, among other things, required the delivery to the Master of the vessel "Nucula" of bills of lading and other customary shipping documents consigning the oil to the Naval Officer-in-Charge, Auckland, New Zealand.

(c) The execution of the bill of lading consigning the oil to the Naval Officer-in-Charge at Auckland, New Zealand.

(d) The execution and filing of the export declaration.

[fol. 167] (e) The actual exportation of the oil to New Zealand pursuant to the contract, bill of lading, and export declaration.

(9) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the sale of oil was an intrastate sale instead of an export sale.

(10) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the power of the State to tax exports is coextensive with and subject to the same limitations as its power to tax interstate commerce sales or transactions.

(11) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the tax levied upon appellant was not invalid, illegal or unenforceable and was not contrary to, or in violation of, the provisions of Article I, section 10, clause 2, of the Constitution of the United States, because the said tax was non-discriminatory.

(12) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its deter-

mination that the provisions of the California Retail Sales Tax Act of 1933, as amended, construed and applied to impose a tax measured by the gross proceeds of the export sale of the oil here involved, could be sustained as an excise [fol. 168] or privilege tax on the privilege of performing in California acts which were part of, or steps in, the exportation of said oil.

(13) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the scope and effect of United States Constitution, Article I, section 10, clause 2 permits or requires different results as to the validity of a tax upon exports when (1) the goods are delivered for exportation to the purchaser's vessel, and (2) when the goods are delivered for exportation to a common carrier.

(14) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in reversing the judgment of the Superior Court of the State of California.

PRAYER FOR REVERSAL

For which errors, appellant, Richfield Oil Corporation, prays that the said judgment of the Supreme Court of the State of California, dated November 1, 1945, in the above entitled action be reversed and a judgment rendered in favor of the said appellant, and for costs.

Dated: January 17, 1946.

Robert E. Paradise, Norman S. Sterry, Counsel for Appellant. Lloyd & Paradise, Gibson, Dunn & Crutcher, Of Counsel.

[fol. 169] [File endorsement omitted.]

[fol. 170] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 17, 1946

Richfield Oil Corporation, a corporation, having prayed for an allowance of an appeal to the Supreme Court of the United States from the final judgment rendered by the Su-

preme Court of the State of California in the above entitled cause and having presented and filed its petition for appeal, assignment of errors and prayer for reversal, and a statement as to jurisdiction on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

It is now ordered that an appeal be and the same is hereby allowed in the above entitled cause as provided by law, from the Supreme Court of the State of California to the Supreme Court of the United States; and

[fol. 171] It is further ordered that the clerk of the Supreme Court of the State of California prepare and certify a transcript of the record in this cause, as may be designated by the appellant and appellee, and transmit the same to the Supreme Court of the United States so that the clerk of said Court shall have said record within sixty days from this date; and

It is further ordered that security for costs on appeal be fixed in the sum of $500.00, and that upon approval of bond in said amount all further proceedings in the above entitled cause shall be stayed until final determination of said appeal.

Dated: January 17, 1946.

Phil S. Gibson, Chief Justice of the Supreme Court of the State of California.

[fols. 172-174] Citation in usual form, filed Jan. 17, 1946, omitted in printing.

[fol. 175] Bond on Appeal for $500.00 omitted in printing.

[fol. 176] [File endorsement omitted.]

[fol. 177] IN THE SUPREME COURT OF THE UNITED STATES

PRAECIPE FOR TRANSCRIPT ON APPEAL TO SUPREME COURT OF UNITED STATES—Filed January 17, 1946

To the Supreme Court of the State of California and to the Clerk thereof:

On behalf of Richfield Oil Corporation, appellant, it is requested that you prepare and certify the transcript of record on appeal to the Supreme Court of the United States in the above entitled cause and the following are hereby designated to be included in said transcript:

1. Clerk's transcript on appeal as filed in Supreme Court of the State of California.

2. Proceedings in Supreme Court of the State of California.

3. Petition for allowance of appeal, assignments of error and prayer for reversal.

[fol. 178] 4. Statement of jurisdiction on appeal.

5. Order allowing appeal.

6. Bond on appeal.

7. Citation on appeal.

8. Praecipe for transcript on appeal.

9. Appellant's notice to appellee of appeal and statement directing appellee's attention to paragraph 3, rule 12, Rules of Supreme Court of the United States.

10. Proof of service on appellee of preceding documents designated as numbers 3 to 9 inclusive.

11. All statements and motions required and permitted to be filed under rule 12 of Rules of the United States Supreme Court.

Dated: January 17, 1946.

Robert E. Paradise, Norman S. Sterry, Attorneys for Appellant.

Lloyd & Paradise, Gibson, Dunn & Crutcher, of Counsel.

[fols. 179-180] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 181] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY, AND DESIGNATION OF RECORD—Filed February 25, 1946

In compliance with Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, Appellant, Richfield Oil Corporation, hereby adopts each and every of its assignments of error as its statement of points intended to be relied upon by Appellant.

In further compliance with Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, Appellant, Richfield Oil Corporation, thinks the entire record of the above entitled cause, as certified by the Clerk of the Supreme Court of California, is necessary for the consideration of the points upon which Appellant intends to rely; and accordingly Appellant, Richfield Oil Corporation, designates that the entire record, as certified by the Clerk of the Supreme Court of the State of California, shall be [fol. 182] printed by the Clerk of the Supreme Court of the United States.

Dated: February 15, 1946.

Norman S. Sterry, Counsel for Appellant.

Robert E. Paradise, Lloyd and Paradise, Gibson, Dunn & Crutcher, of Counsel.

[fol. 185] PROOF OF SERVICE OF PAPERS ON APPELLEE

Service is hereby acknoweldged on this 18th day of February, 1946, of the following in the above entitled cause:

Statement of Points on Which Appellant Intends to Rely, and Designation of Record.

Robert W. Kenny, Jr., Attorney General of the State of California, Attorney for Appellee.

John Noursc, Deputy Attorney General of the State of California, of Counsel.

[fol. 183a] [File endorsement omitted.]

[fol. 184] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF QUESTION OF JURISDICTION TO HEARING ON MERITS—March 25, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

Mr. Justice Jackson took no part in the consideration of this question.

Endorsed on Cover: File No. 50,567. California, Supreme Court. Term No. 864. Richfield Oil Corporation, Appellant, vs. State Board of Equalization. Filed February 18, 1946. Term No. 864 O. T. 1945.

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 18 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 8[redacted] 46

RICHFIELD OIL CORPORATION, A CORPORATION,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

ROBERT E. PARADISE,
NORMAN S. STERRY,
Counsel for Appellant.

INDEX

Subject Index.

	Page
Statement as to jurisdiction	1
Statement of the federal questions involved in the appeal	1
Statement of the case	1
Opinions below	3
Statutory provisions sustaining jurisdiction	4
State statute involved	4
Date of judgment and application for appeal	6
Raising the federal question	7
Cases believed to sustain jurisdiction	8
Statement of grounds upon which it is contended the questions involved are substantial	8
The decision of the majority of the California Supreme Court that the exportation of oil did not commence until the "Nucula" actually started for New Zealand would practically destroy the constitutional prohibition against state taxation of exports	9
The power of the states to tax exports is not coextensive with their power to tax interstate commerce transactions	11
The suggestion of the majority opinion that the tax can be sustained as an excise tax is clearly erroneous	13
The federal question involved is one of vital public interest	14
Conclusion	14
Appendix "A"—Opinion of the Supreme Court of California of December 30, 1944	16
Appendix "B"—Second and final opinion of the Supreme Court of California of November 1, 1945	31

Table of Cases Cited.

Page

A. G. Spalding & Brothers v. *Edwards*, 262 U. S. 66, 9, 10, 11, 19, 28, 34, 39
American Steel & Wire Co. v. *Speed*, 192 U. S. 500 12, 14
Brown v. *Maryland*, 12 Wheat. 419, 7 Curtis 262, 13, 14, 20, 22, 23, 28, 40, 42, 44
Chicago, etc., Co. v. *Perry*, 259 U. S. 548 8
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282 8, 11
Fairbanks v. *U. S.*, 181 U. S. 283 9, 12, 22, 23, 43
First National Bank v. *Anderson*, 269 U. S. 341 8
Hooven & Allison Co. v. *Evatt*, 65 S. Ct. 870, 89 L. Ed. 852 11, 12, 14
Hughes Bros. Timber Co. v. *Minnesota*, 272 U. S. 469 11
Market St. Railway Co. v. *Railroad Commission*, 89 L. Ed. 788 6
Nickey v. *Mississippi*, 292 U. S. 393 8
Pennsylvania Railroad Co. v. *Clark Bros., etc., Co.*, 238 U. S. 456 11
Railroad Commission of Louisiana v. *Texas & P. R. Co.*, 229 U. S. 336 9, 19, 39
Richfield Oil Corporation v. *State Board of Equalization*, 155 Pac. (2d) 1, 27 A. C. 150 7, 13
Sonneborn Bros. v. *Keeling*, 262 U. S. 506 12
Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498 9, 19
Standard Oil Co. v. *Johnson*, 316 U. S. 481 8
Sully v. *American National Bank*, 178 U. S. 289 8
Texas & N. O. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111 9, 19, 39
U. S. v. *County of Allegheny*, 322 U. S. 174 8, 13
U. S. v. *Hvoslef*, 237 U. S. 1 9, 23, 43
Whitfield v. *Ohio*, 297 U. S. 431 8, 12
Woodruff v. *Parham*, 8 Wall. 123 12, 22, 23, 27

STATUTES CITED

	Page
California Retail Sales Tax Act of 1933, Chapter 1020 of California Statutes, 1933, as amended by Chapters 351, 355 and 357 of California Code, 1935	4
California Rules on Appeal, Rule 24	6
Constitution of the United States, Article I, Section 10, Clause 2	7
Judicial Code, Section 237 (a), as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. 344a and 861a)	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 864

RICHFIELD OIL CORPORATION, A CORPORATION,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee

STATEMENT AS TO JURISDICTION

Statement of Federal Question Involved in the Appeal

The question presented by this appeal is whether the California Sales Tax Act of 1933, Chapter 1020 of California Statutes, 1933, as amended by the Statutes of 1935, construed, applied and enforced, to permit and require a tax upon the sale of fuel oil to the New Zealand Stores Control Board for exportation from California to New Zealand, and which was so exported, is repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States.

Statement of the Case

In February, 1934, appellant's predecessor in interest, whose obligations it assumed (Complaint, Par. III, R. 3-4),[1]

[1] The trial court found all averments of the complaint to be true (Finding I, R. 74). The Supreme Court did not question this finding in any of its decisions.

References to the facts stated, unless otherwise noted, will be to the averments of the complaint and to the pages of the typewritten Clerk's

entered into a contract in New Zealand with the New Zealand Government Stores Control Board, for the sale of fuel oil to be transported by a vessel of the New Zealand Government from California to New Zealand, the purchase price to be f. o. b. Los Angeles. The contract also provided that bill of lading and other customary documents should be delivered to the Master consigning the oil to the Naval Officer-in-Charge at Auckland, New Zealand (Complaint, Par. VI, R. 9).

Pursuant to the contract, the New Zealand Naval Tank Steamer "Nucula" came to the Marine Terminal, Long Beach where the appellant delivered to it 43,756.85 barrels of fuel oil. Bill of lading consigning the said oil to the Naval Officer-in-Charge at Auckland, New Zealand, was duly made out and the appellant filed in the Office of the United States Collector of Customs a Shipper's Export Declaration (Complaint, Par. VI, R. 10-11).

The appellee Board thereafter assesesd a tax of 3% on the gross purchase price which tax, with interest, amounted to $1,514.78 (Complaint, Par. V, R. 5), which appellant paid under protest, a copy of the protest being attached to the Complaint as Exhibit "A" (R. 16-18), and thereafter appellant duly filed a claim with said Board for a refund of said tax, copy of which is attached to the Complaint as Exhibit "B" (R. 18-26). The claim being denied, appellant instituted this suit in the Superior Court of the State of California in and for the County of Sacramento to recover the tax paid.

The Board filed an answer to the Complaint admitting all of the averments other than the allegation that the sale was an export sale (R. 26-28).

Transcript on Appeal, upon which the case was reviewed by the Supreme Court of California, and which is included in the transcript certified to this Court.

Opinions Below

The trial court rendered an opinion found in the transcript at pages 50-73, in which the court determined the entire transaction constituted an export sale, and entered Findings of Fact (R. 74-97) from which the court made the following Conclusions of Law (R. 98-99):

"I

"That the sale and delivery of the said oil to the R. F. A. 'Nucula' constituted and was an export sale of the said oil within the meaning of Article I, Sections 9 and 10, of the Constitution of the United States.

* * * * * * *

"IV

"That if the said California Retail Sales Tax Act as amended be construed, applied or enforced in such manner as to impose a tax upon said sale of fuel oil hereinbefore described, said Act is invalid, illegal and unenforceable, in that it is contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2, of the Constitution of the United States."

Judgment was entered accordingly for appellant.

The Appellee Board duly appealed to the Supreme Court of California. The Federal questions herein considered were urged in the briefs of both parties.[2]

On December 30, 1944, the Supreme Court rendered its decision in bank affirming the judgment of the Superior Court, Justice Carter dissenting. The majority and minority opinions are unofficially reported in 155 Pac. 2d 1. A copy of them is attached as Appendix "A".

---

[2] Under the California practice, there is no assignment of error; the questions presented are set forth only in the briefs.

Thereafter, a rehearing was granted and the opinion of the majority of the Court was entered reversing the judgment of the Superior Court, the Chief Justice and Justice Edmonds dissenting. This decision has not yet been officially reported. It is unofficially reported in 27 A. C. 150. A copy of the said majority and minority opinions is attached hereto as Appendix "B".

Statutory Provisions Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. 344 (a), 861a).

State Statute Involved

The statute of the State of California the validity of which is involved, is the California Retail Sales Tax Act of 1933, Chapter 1020 of California Statutes, 1933, and which was amended by Chapters 351, 355 and 357 of California Statutes, 1935.

Sec. 3 of the Retail Sales Tax Act as amended by Chap. 355, California Statutes, 1935, imposed a tax as follows:

> "Sec. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes."

Sec. 2 of the Act defined "sale", "retail sale", "retailer" and "gross receipts" respectively as follows:

"(b) 'Sale' means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale."

"(c) A 'retail sale' or 'sale at retail' means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property."

"(e) 'Retailer' includes every person engaged in the business of making sales at retail."

"(f) 'Gross receipts' means the total amount of the sale price of the retail sales of retailers, including any services that are a part of such sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expense whatsoever; provided, however, that cash discounts allowed and taken on sales shall not be included, and 'gross receipts' shall not include the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit, nor shall 'gross receipts' include the price re-

ceived for labor or services used in installing, applying remodeling or repairing the property sold."[3]

"* * *

Sec. 5 of the Act as amended by Chap. 355, California Statutes, 1935, provided an exemption as follows:

"Sec. 5. There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act the following:

"(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."[4]

Date of Judgment and Application for Appeal

The decision of the Supreme Court on rehearing was filed on November 1, 1945. Under the California Rules on Appeal, the appellant had fifteen days within which to petition for a rehearing (Rule 27 (b)), and appellant duly filed its petition on the 14th day of November, 1945. On November 29th, 1945, the Supreme Court denied a rehearing and the decision became final. See:

Rule 24 of California Rules on Appeal.

Market Street Railway Company v. *Railroad Commission* (not yet officially reported), 89 L. Ed. 788.

The application for appeal was presented January 17, 1946.

---

[3] There are other provisions in Sec. 2 (f) not set out because not applicable to any of issues involved in the case.

[4] The majority opinion of the Supreme Court in its last and final decision refers to the section of the Revenue and Taxation Code. That is a codification of the Sales Tax Act, and while the provisions are substantially the same as the sections of the Act quoted, it was not in force at the time of the sale or involved in the litigation, the taxable period involved being April 1 to June 30, 1937. (Complaint III, R. 5.)

Raising the Federal Question

The complaint in the trial court, in addition to incorporating the claim for refund (in which the appellant asserted that the California Statute if construed, applied, or enforced in such manner as to impose a tax on the said sale was in contravention of the provisions of Article I, Section 10, Clause 2 of the Federal Constitution (R. 24), directly averred in Paragraphs VIII and IX:

> "That said sale of fuel oil was and is exempt from tax pursuant to the provisions of Section 5 (a) of the California Retail Sales Tax Act, as amended. That the taxation by the State of California of such sale in export and foreign commerce was and is prohibited under the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States of America."
>
> "That if the California Retail Sales Tax Act, as amended, be construed, applied or enforced in such manner to impose said tax upon said sale of fuel oil hereinabove described, the said California Retail Sales Tax Act is invalid, illegal and unenforceable and contrary to and in violation of the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States of America" (R. pp. 14-15).

In the majority opinion of the final decision of the Supreme Court of the State of California, it is said:

> "Plaintiff invokes the Constitution of the United States as a bar to the collection of the tax. * * * 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, * * *.'"
>
> "It should be clear that the sales tax imposed in the instant case does not violate the United States Constitution."
>
> *Richfield Oil Corporation* v. *State Board of Equalization*, 27 A. C. 150, 152.

Cases Believed to Sustain Jurisdiction

Standard Oil Company v. *Johnson*, 316 U. S. 481, 482-3;
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 289;
First National Bank v. *Anderson*, 269 U. S. 341, 345-6;
U. S. v. *County of Allegheny*, 322 U. S. 174, 192;
Chicago, etc. Co. v. *Perry*, 259 U. S. 548, 551;
Sully v. *American National Bank*, 178 U. S. 289, 298;
Nickey v. *State of Mississippi*, 292 U. S. 393, 394;
Whitfield v. *Ohio*, 297 U. S. 431, 435-6.

Statement of Grounds upon Which It Is Contended the Questions Involved Are Substantial

The majority opinion of the California Supreme Court in its last decision based its conclusion that the statute as construed was not repugnant to the Constitution upon three grounds:

1. That, as title passed upon delivery of the oil to the purchaser's vessel, the sale was completed within California, and that the export did not commence until the "Nucula" started to New Zealand.

2. That in effect, the power of the States to tax exports is coextensive with and subject to the same limitations as their power to tax interstate commerce transactions, and hence a sales tax on exports is valid if the same tax is laid on intrastate sales, notwithstanding the constitutional prohibition against any tax by a State upon exports.

3. The tax can probably be sustained as a license tax for the privilege of doing business within the State of California.

We submit all three grounds are erroneous and contrary to the unbroken line of decisions of this Court.

(1) *The decision of the majority of the California Supreme Court that the exportation of oil did not commence until the "Nucula" actually started for New Zealand would practically destroy the constitutional prohibition against state taxation of exports.*

If this portion of the decision be allowed to stand and thus to establish the law that the exportation of goods, sold under a contract calling for their exportation, has not commenced until the vessel which is to transport them to the foreign purchaser has been started on its journey, it is apparent that the constitutional inhibition against State taxation on exports is of no practical value. Such a rule would defeat the very object sought to be effected by the Constitution. If, as held by the majority opinion of the California Supreme Court, goods are not in the process of exportation until after they have been first loaded into a vessel and the vessel commenced its journey to the foreign port, the seaboard states at whose ports the goods were loaded upon the vessel could, as they did before the Constitution, levy any taxes they saw fit. See:

United States v. *Hvoslef*, 237 U. S. 1, 13;
Fairbank v. *United States*, 181 U. S. 283, 292-3.

The decision of the majority of the Supreme Court of California is contrary to the unbroken line of decisions of this Court that the exportation of goods commences with their first movement towards the sea. See:

Texas & N. O. R. Co. v. *Sabine Tram. Co.*, 227 U. S. 111, 123;
Railroad Commission of Louisiana v. *Texas & P. R. Co.*, 229 U. S. 336, 341;
A. G. Spalding & Brothers v. *Edwards*, 262 U. S. 66, 68-9;
Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498.

The trial court found that as the "Nucula" approached the Marine Terminal, oil was pumped from appellant's refinery at Watson to its storage tanks at the Terminal, and as soon as the "Nucula" had docked and was ready to receive the oil, it was pumped from the storage tanks in continuous flow into the tanks of the "Nucula" (Findings VI to VIII, R. 82-83). From these facts and the decisions above cited, the trial court concluded in its written opinion that the exportation of the oil commenced when the appellant started pumping it from its refinery (R. 52-53). This view was adopted by the Supreme Court in its first opinion. There, speaking through the Chief Justice, the majority of the Court said, citing *Cornell* v. *Coyne*, 192 U. S. 418, 24 S. Ct. 383, *A. G. Spalding & Brothers* v. *Edwards*, 262 U. S. 66, 43 S. Ct. 485, and other decisions of this Court:

> "On the other hand, goods in the actual course of transportation to a foreign destination and goods delivered to a common carrier for that purpose are in the process of exportation and constitutionally cannot be taxed.
>
> • • • • • • •
>
> "Applying these general principles or formulas to the facts of the present case, we are of the opinion that the sale of oil was a step in its exportation and that the tax in question was improperly levied."
> 155 Pac. 2d 1, 3.

It is submitted that *A. G. Spalding & Brothers* v. *Edwards, supra*, is not factually or legally distinguishable from the instant case.

In its final decision, the majority opinion of the California Supreme Court, holds that the *Spalding* case has, in effect, been overruled by subsequent decisions dealing with the power of the States to tax interstate commerce transactions.

The Chief Justice in his dissenting opinion in which Justice Edmonds concurred, concluded that the decision of this Court in *A. G. Spalding & Brothers* v. *Edwards, supra,* is controlling and required an affirmance; that the law was not concerned with the means of shipment where the means chosen guaranteed continuity of the export and foreign delivery in good faith.

We submit this view is correct and in accord with the decisions of this Court. Further, that the majority opinion of the Supreme Court of California in its final decision entirely ignored the essential character of the transaction.

The Constitution prohibits a tax upon an export sale without regard to the vesting of title, and this Court has consistently so held; also, that the character of the sale, whether interstate, import or export, is to be determined from an examination of the entire transaction, the substance and not the form of which is controlling. See:

Hooven & Allison Co. v. *Evatt,* 65 S. Ct. 870, 89 L. Ed. (Adv.) 852, 858-9;

Pennsylvania Railroad Co. v. *Clark Bros. etc. Co.,* 238 U. S. 456, 466;

Dahnke-Walker Milling Company v. *Bondurant,* 257 U. S. 282, 292;

Hughes Bros. Timber Co. v. *State of Minnesota* (Minn.); 272 U. S. 469, 473;

A. G. Spalding & Brothers v. *Edwards, supra,* 262 U. S. 66, 68-9.

(2) *The power of the States to tax exports is not co-extensive with their power to tax interstate commerce transactions.*

In the majority opinion of the California Supreme Court it is said after discussing decisions of this Court sustaining nondiscriminatory taxes on interstate transactions:

> "There is no discrimination penalizing the sale of goods that are exported to the advantage of sales in local or intrastate transactions.
>
> "• • •
>
> "Under the foregoing authorities it is perfectly clear that had this been an interstate transaction it would have been subject to tax."
>
> 27 A. C. 150, 156.

We submit that the majority opinion of the California Supreme Court overlooks the fundamental differences in the constitutional provisions with reference to the two classes of taxes.

There is no constitutional prohibition against State taxation of interstate commerce transactions other than that which is to be implied from the grant to Congress of the power to regulate such commerce. Hence, nondiscriminatory State taxes upon interstate commerce which do not so directly burden it as to amount to an interference with the power of Congress to regulate such commerce encounter no constitutional inhibition.

Such is not the case as to exports. The constitutional prohibition is clear, explicit and all embracing that the States, without the consent of Congress, cannot tax exports. This distinction has been frequently and emphatically pointed out in the decisions of this Court. See:

Hooven & Allison Co. v. *Evatt*, 65 S. Ct. 870, 877, 89 L. Ed. (Adv.) 852, 860;

American Steel & Wire Company v. *Speed*, 192 U. S. 500, 520-1;

Fairbank v. *United States, supra*, 181 U. S. 283, 306;

Woodruff v. *Parham*, 8 Wall. 123;

Sonneborn Bros. v. *Keeling*, 262 U. S. 506.

"In arguing the case of M'Culloch v. Maryland, Luther Martin, Attorney General of Maryland, himself a member of the Constitutional Convention, said, '* * * the State governments surrendered altogether their right to tax imports and exports, and tonnage; giving the authority to tax all other subjects to Congress, but reserving to the States a concurrent right to tax the same subjects to an unlimited extent'."

United States v. *County of Allegheny*, 322 U. S. 174, 176.

(3) *The suggestion of the majority opinion that the tax can be sustained as an excise tax is clearly erroneous.*

The majority opinion of the Supreme Court of California suggests, rather than directly holds, that the tax can be sustained as a privilege for doing business within the State of California. Thus, it is said at page 151:

"Clearly, the sale here involved, falls within the provision of the California sales tax law. It levies a tax, measured by gross receipts, on retailers 'for the privilege of selling tangible personal property at retail * * *'."

and again at the close of the opinion:

"In the instant case the tax imposed was a uniform non-discriminatory excise tax on the privilege of doing business in this state."

Richfield Oil Corporation v. *State Board of Equalization*, 27 A. C. 150, 151, 156-7.

While the State can impose a license tax for the privilege of doing business within the State, obviously it cannot impose a license tax for doing an export or import business within the State since that is directly prohibited by the Constitution. See:

Brown v. *Maryland*, 12 Wheat. 419, 7 Curtis, 262, 263, 269, 270.

"Since Brown v. Maryland, 12 Wheat. 436, 6 L. Ed. 684, it has not been open to question that taxation imposed by the states upon imported goods, whether levied directly on the goods imported or indirectly, by burdening the right to dispose of them, is repugnant to that provision of the Constitution * * *."

American Steel & Wire Co. v. *Speed, supra,* 192 U. S. 500, 519.

See: *Hooven & Allison Co.* v. *Evatt,* 65 S. Ct. 870, 875-6, where it is stated that there has never been any deviation from the rule of *Brown* v. *Maryland, supra.*

Obviously, a tax on the privilege of making an export sale is, in effect, a tax upon the sale itself.

The Federal Question Involved Is One of Vital Public Interest

While the amount sought in the suit involves a tax of principal and interest of slightly in excess of $1500, we are informed by the Attorney General's Office that assessments on similar sales of oil by other companies in excess of a million dollars are awaiting final determination of this suit, and we know that the enforcement of other similar assessments against this appellant of approximately three hundred thousand dollars are being so held. But of far greater importance to the public is the fact that the decision must affect every future export sale in all of the States.

Conclusion

We respectfully submit that the Federal question involved is substantial and of exceptional public interest and importance; and that this Court has jurisdiction of the appeal.

Dated: Los Angeles, California, January 17, 1946.

Respectfully submitted,

ROBERT E. PARADISE,
NORMAN S. STERRY,
Counsel for Appellant.

LLOYD & PARADISE,
GIBSON, DUNN & CRUTCHER,
Of Counsel.

APPENDIX "A"

Decision of the Supreme Court of the State of California, December 30, 1944

GIBSON, *Chief Justice:*

This is an appeal from a judgment for plaintiff in an action to recover, with interest, a sum paid under protest as a retail sales tax and as interest thereon.

Plaintiff is a foreign corporation authorized to do business in California and engaged in producing, refining and selling crude oil and crude oil products. On December 3, 1936, the New Zealand Government, acting through its official purchasing agency, the Stores Control Board, invited bids for the supply of fuel oil required by the New Zealand Division of the Royal Navy. The invitation provided that bids were to be for delivery "f.o.b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer." Plaintiff instructed its agent in New Zealand to submit a bid specifying that the price quoted was f.o.b. ship's rail of buyer's tanker at the Richfield Marine Terminal at Long Beach, California. Plaintiff's bid was accepted and a written contract for the sale of oil was entered into in New Zealand on February 4, 1937. The contract contained, among other, the following provisions: "(1). Price * * * F.o.b. Los Angeles, payment in London, * * * (3). Delivery shall be given to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank Steamer R. F. A. 'Nucula' at Los Angeles, California. (7). The Richfield Oil Co. shall advance to the Master of the 'Nucula' at Los Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading * * *, such advance to be repaid when payment is made for the fuel oil. (8). Bills of lading and other customary shipping documents shall be handed to the Master of the 'Nucula' and the oil consigned to the Naval-Office-In-Charge, Auckland, New Zealand."

On May 14, 1937, pursuant to the contract, plaintiff delivered the oil into the "Nucula" at Long Beach, California.

The oil was processed at plaintiff's refinery at Watson and piped to its storage tanks at Long Beach, from which it was loaded aboard the vessel. Following such delivery, plaintiff handed to the master of the vessel customary shipping documents, including a bill of lading designating plaintiff as shipper and providing for delivery unto the Naval Officer in Charge at the Port of Auckland, New Zealand. Plaintiff also filed with the United States Collector of Customs a Shipper's Export Declaration, which reported the shipment by plaintiff from Long Beach, California, to Auckland, New Zealand. Thereafter, the entire supply of oil was delivered to the New Zealand Division of the Royal Navy at Auckland, and payment therefor was made to plaintiff in London, England.

On September 25, 1940, defendant assessed a retail sales tax against plaintiff measured by gross receipts from the foregoing transaction. Plaintiff paid the tax with interest, a total of $1,514.78, under protest on July 7, 1942. In September, it filed a claim for refund which was denied. The present action was then commenced.

The cause was submitted to the trial court on the pleadings and on stipulation of fact entered into by the parties. The trial court found, in addition to the facts heretofore recited that oil had never been produced in New Zealand in sufficient quantities to supply the needs of the New Zealand Division of the Royal Navy, that plaintiff had previously made a shipment of oil to New Zealand under identical circumstances, and that it had always been the intent of the parties to the contract that the oil would be exported to New Zealand without interruption. The court concluded that plaintiff was entitled to a refund of the amount paid, together with interest thereon, and entered judgment accordingly. This appeal followed.

The California Sales Tax Law imposes a tax upon retailers, measured by gross receipts, "for the privilege of selling tangible personal property at retail," and authorizes retailers to collect the tax from the consumers. (Revenue and Taxation Code, §§ 6051, 6052.) A sale is defined therein as "any transfer of title or possession . . . in any manner or by any means whatsoever, of

tangible personal property * * *." (§ 6006.) By express provision of the law, gross receipts from sales of property which the state is prohibited from taxing under the Constitution of the United States are exempt from computation of the amount of tax imposed. (§§ 6351, 6352.)

The sale or taxable event in the present case occurred when the fuel oil was loaded aboard the tanker "Nucula" at Long Beach, California, it being conceded that title to the oil passed to the New Zealand Government at that time. In support of the judgment, however, plaintiff contends that gross receipts from the sale were not subject to taxation under the law by reason of the prohibition of the federal Constitution that "No State shall * * * lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's (its) Inspection Laws." (Art. I, § 10, cl. 2.) Defendant contends, on the other hand, that the sale of oil preceded its exportation and consequently was a local transaction subject to state taxation. It further contends that even if the oil attained the status of an export prior to the sale, the "export-import" clause of the Constitution does not prohibit the imposition of a sales tax based on that transaction.

It is admittedly difficult to ascertain the precise point at which the products of a state which are exported to foreign countries cease to be a part of the general mass of property of that state, subject to nondiscriminatory taxation as such, and become "exports" entitled to the constitutional protection against the imposition of taxes or duties. Clearly, goods not intended for export when a general tax is laid on all property alike, are not exempt therefrom because they happen to be exported afterwards. (Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257.) And, goods are not exempt from such taxation merely because they are intended for exportation or manufactured under a contract for export. (Turpin v. Burgess, 117 U. S. 504, 6 S. Ct. 835, 29 L. Ed. 988; Cornell v. Coyne, 192 U. S. 418, 24 S. Ct. 383, 48 L. Ed. 504.) On the other hand, goods in the actual course of transportation to a foreign destination and goods delivered to a common carrier for that purpose are in the process of exportation and

constitutionally cannot be taxed. (Spalding & Bros. v. Edwards, 262 U. S. 66, 43 S. Ct. 485, 67 L. Ed. 865; see Peck & Co. v. Lowe, 247 U. S. 165, 175, 38 S. Ct. 432, 62 L. Ed. 1049; Turpin v. Burgess, supra, 117 U. S. at page 506, 6 S. Ct. 835, 29 L. Ed. 988; Coe v. Errol, 116 U. S. 517, 527, 6 S. Ct. 475, 478, 29 L. Ed. 715.) It was said in Coe v. Errol, supra, that goods exported to a foreign country do not cease to be part of the common property of the state of their origin for tax purposes until they "have been shipped or entered with a common carrier for transportation * * * or have been started upon such transportation in a continuous route or journey." (Cf. Railroad Commission v. Texas & P. R. Co., 229 U. S. 336, 33 S. Ct. 837, 57 L. Ed. 1215; Texas & N. O. R. Co. v. Sabine Tram. Co., 227 U. S. 111, 33 S. Ct. 229, 57 L. Ed. 442; Southern P. Terminal Co. v. Interstate Commerce Comm., 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310.)

Applying these general principles or formulas to the facts of the present case, we are of the opinion that the sale of oil was a step in its exportation and that the tax in question was improperly levied. The case of A. G. Spalding & Bros. v. Edwards, supra, is substantially on all fours with the present case and the decision of the United States Supreme Court therein is, of course, controlling. In that case, Delgado & Compania, a Venezuelan firm, requested New York commission merchants to buy certain sporting goods for their account. The commission merchants ordered the goods from the plaintiff, instructing it to deliver the same to a specified exporting carrier in New York addressed to Delgado & Compania. The plaintiff delivered the goods as directed and received a receipt from the carrier which it sent to the commission merchants, who exchanged it for a bill of lading in their own name. The commission merchants paid plaintiff and in due time the goods were transported and delivered to Delgado & Compania in Venezuela. In holding that a tax based on that sale could not constitutionally be imposed upon plaintiff, the court stated, 262 U. S. at page 69, 43 S. Ct. at page 486, 67 L. Ed. 865, in language equally applicable to the case at bar, "The very act that passed the title, and that would have incurred

the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port."

It is true that the Spalding case involved section 9, clause 5 of the Constitution, which prohibits Congress from laying taxes on articles exported from any state, rather than section 10, clause 2, but it has been repeatedly said that the prohibitions of those sections are identical. (Turpin v. Burgess, 117 U. S. 504, 506, 6 S. Ct. 835, 29 L. Ed. 988; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, 687.) Defendant seeks to distinguish the case, however, on the ground that while delivery therein was to a common carrier, delivery in the present case was to the purchaser's carrier. The distinction is one of form rather than substance. Delivery of goods to a common carrier for transportation is regarded as the beginning of the export journey because the destination of the goods is thereby fixed and certain. (Cf. Turpin v. Burgess, supra, 117 U. S. at page 507, 6 S. Ct. 835, 29 L. Ed. 988; Superior Oil Co. v. Mississippi, 280 U. S. 390, 396, 50 S. Ct. 169, 74 L. Ed. 504; Coe v. Errol, 116 U. S. 517, 527, 6 S. Ct. 475, 29 L. Ed. 715.) But delivery of the oil to the "Nucula" in this case as effectively fixed its destination as did the delivery of the Goods to the common carrier in the Spalding case. Here, as there, title passed upon delivery, and the passage of title enables the purchaser to change the destination of the goods and thereby evade the tax. But, as stated in A. G. Spalding & Bros. v. Edwards, supra, 262 U. S. at page 70, 43 S. Ct. at page 486, 67 L. Ed. 865, "There was not the slightest probability of any such change and it did not occur," and "theoretical possibilities may be left out of account."

The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. The means selected in this case, in the light of all the circumstances, satisfies that inquiry. The transaction in issue featured a contract negotiated and entered into in New Zealand for the sale of fuel

oil to supply foreign needs. Under that contract plaintiff was obligated to deliver the oil to the order of "Naval Secretary, Navy Office, Wellington" into the tanker "Nucula" at Long Beach, furnish the master of the tanker with customary shipping documents, including a bill of lading consigning the oil to the "Naval-Officer-In-Charge, Auckland, New Zealand," and advance a sum equal to £300 to the master to meet disbursements at the port of loading. Plaintiff performed the obligations of its contract. It also executed an export declaration, and, as provided in the contract, received payment for the oil in London, England. From the inception of negotiations the parties contemplated an exportation of oil, and the oil was in fact exported to New Zealand. The only local phase of the sale was the delivery to the carrier in this state, and that delivery was the first step in the exportation. As stated in A. G. Spalding & Bros. v. Edwards, supra, 262 U. S. at page 70, 43 S. Ct. at page 486, 67 L. Ed. 865, "To put it at any later point would fail to give to exports the liberal protection that hitherto they have received."

The present case is even stronger than the Spalding case, for where as here, the alleged local transaction was a direct sale to the foreign consumer and the oil was actually loaded aboard the carrier, the sale in the Spalding case was to an intermediary and the goods were merely delivered to the carrier.

Defendant argues that unless the Spalding case is distinguished or overruled an anomalous situation will exist in that the sale in the present case would have been taxable had the oil been intended for and transported in interstate commerce. It cites Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188; Superior Oil Co. v. Mississippi, 280 U. S. 390, 50 S. Ct. 169, 74 L. Ed. 504; and Standard Oil Co. v. Johnson, 56 Cal. App. 2d 411, 132 P. 2d 910, in support of the constitutionality of such a tax under the commerce clause. While a few cases have suggested that the prohibitions of the commerce and export-import clauses of the Constitution are substantially identical insofar as taxation is concerned (Crew-Levick Co. v. Pennsylvania, 245 U. S. 292,

295, 38 S. Ct. 126, 62 L. Ed. 295; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678), other cases have rejected even an analogy between the two. (Sonneborn Bros. v. Cureton, 262 U. S. 505, 43 S. Ct. 643, 67 L. Ed. 1095 (refusing to apply original package doctrine to sales of articles transported in interstate commerce); Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382; cf. Fairbank v. United States, 181 U. S. 283, 306, 21 S. Ct. 648, 45 L. Ed. 862.) And, in two of the three cases involving the commerce clause cited by defendant, the Spalding case was expressly distinguished on the ground that it involved the export-import clause of the Constitution. (Superior Oil Co. v. Mississippi, supra; Standard Oil Co. v. Johnson, supra.) The distinction thus drawn between cases involving exports and cases dealing with interstate commerce is not without basis. Section 10, clause 2 in terms prohibits state taxation of exports, while section 8, clause 3 merely commits the regulation of commerce to the federal government. Modern authorities recognize that those engaged in interstate commerce must pay their just share of state tax burdens, and that a state tax infringes the authority of Congress over interstate commerce only when it discriminates against or directly burdens such commerce. (McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876.) Defendant itself asserts that under the commerce clause "The question of where interstate or foreign commerce begins is wholly separate and apart from the question of what events occurring within a state are taxable."

Defendant advances two arguments in support of the contention that the tax imposed in the present case, although based upon gross receipts from the sale of oil in the process of exportation, does not violate article I, section 10, clause 2 of the Constitution: First, the tax is one imposed on retailers for the privilege of selling and is not an "impost" or "duty" on exports within the meaning of the constitutional prohibition. Second, the constitutional prohibition against state taxation of exports does not apply to exports originating in the taxing state. In our opinion, neither argument is sound.

In the early case of Brown v. Maryland, 12 Wheat. 419, 444, 6 L. Ed. 678, 687, where the state argued that a license tax on importers did not contravene article I, section 10, clause 2 since it was a tax on the person rather than the article, the Supreme Court said: "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that, a tax on the sale of an article * * * is a tax on the article itself. * * * So, a tax on the occupation of an importer is * * * a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made." By way of dictum the court announced that a license tax on exporters would likewise contravene the prohibitions of the Constitution. And in the more recent case of Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295, it was expressly held that a state license tax on wholesale venders of merchandise, measured by gross receipts, is in effect an impost on exports when applied to merchandise sold and shipped to customers in foreign countries. (Cf. United States v. Hvoslef, 237 U. S. 1, 35 S. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286; Fairbank v. United States, 181 U. S. 283, 21 S. Ct. 648, 45 L. Ed. 862.)

The case of Crew-Levick Co. v. Pennsylvania, supra, is also authority for the proposition that the constitutional protection of exports is not limited to exports originating outside the taxing state. There, the State of Pennsylvania unsuccessfully sought to tax exports originating in that state. While it may be conceded that article I, section 10, clause 2 was conceived in the desire to prevent the seaboard states from exacting tribute from their sister states (see Cook v. Pennsylvania, 97 U. S. 566, 574, 24 L. Ed. 1015; Woodruff v. Parham, 8 Wall. 123, 134, 135, 75 U. S. 123, 134, 135, 19 L. Ed. 382), the prohibition is general in its terms. As stated in Blount v. Munroe, 60 Ga. 61, 67, "The constitution does not prescribe that no state shall levy such a tax on exports of articles brought from other states to

her seaport towns, but simply and without exception, it lays the ban of prohibition upon all exports."

The judgment is affirmed.

Shenk, Curtis, Edmonds, and Schauer, JJ., concurred.

Traynor, J., did not participate therein.

CARTER, Justice (disenting):

I dissent. In arriving at the conclusion that the plaintiff is exempt from the payment of sales tax upon the transaction in controversy, the majority of this court has ignored the more recent cases decided by the United States Supreme Court, and has based its decision upon what may be termed the old approach as applied to interstate and foreign commerce. Under that approach a state is entirely inhibited from coming into contact with that commerce through its taxing power. On the other hand, cases decided by the United States Supreme Court since 1937 signify a new approach, whereby complete immunity from various state taxes which resulted from the earlier doctrine has been repudiated. (See Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944; J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429; Gwin, White & Prince, Inc., v. Henneford, 305 U. S. 434, 59 S. Ct. 325, 83 L. Ed. 272; McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876; Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229; Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188.) The essence of these decisions is recognition that not all state taxation is to me condemned because, in some manner, it has an effect upon interstate commerce, and recognition that there may be local activities by a taxpayer within a state, which may be sufficient to support a tax independent of the character of the transaction as a whole, and though the tax may have some incidental effect on other than the purely local or intrastate aspects of that commerce.

In McGoldrick v. Berwind-White Coal Min. Co., supra, a New York City tax upon the sale of goods for consump-

tion was upheld as applied to a Pennsylvania corporation engaged in the production of coal in Pennsylvania and delivered by it to customers in New York. The tax was held to be conditioned upon events occurring within the state—delivery or the transfer of title or possession. It was said that not all state taxation is to be condemned because, in some manner, it has an effect upon commerce, and it is only when the tax operates to regulate commerce between the states or foreign nations to an extent that infringes the authority of Congress that the tax can be said to exceed constitutional limitations.

In Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 250, 85 L. Ed. 267, 130 A. L. R. 1229, a tax on a foreign corporation's privilege of doing business was sustained. Liability was not imposed until the declaration of dividends payable to out-of-state stockholders. The court stated that, "The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

In Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, 61 S. Ct. 885, 85 L. Ed. 1188, the Indiana Gross Income Tax Act of 1933, c. 50, was upheld as applied to a foreign corporation engaged in the business of purchasing railroad ties and selling them to purchasers with whom it had a contract for treating the ties by creosoting them. As to the dealings in question it appeared that the taxpayer purchased and received the ties from local producers in Indiana and sold them to the Baltimore & Ohio Railroad Company, making delivery f. o. b. cars on the railroad tracks in Indiana, pursuant to contract. The ties were then forthwith transported to Ohio for treatment. It was held that the tax was predicated upon local transactions which were none the less intrastate because the ties were intended for

interstate shipment. It was pointed out that the taxpayer did not pay the freight for the transportation and that there was a completed delivery to the railroad company in Indiana. J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429, which arose under the same taxing act of Indiana, was distinguished. There the tax was laid upon receipts from sales where delivery was made to customers in other states and abroad.

The California sales tax here under discussion has been held applicable to a sale of petroleum products within the state to purchasers intending to tranport the products out of state. Standard Oil Co. v. Johnson, 56 Cal. App. 2d 411, 132 P. 2d 910. In that case delivery of some of the items was made f. o. b. the purchasers' tank cars. See, also, O'Kane v. State, 283 N. Y. 439, 28 N. E. 2d 905, and Trotwood Trailers v. Evatt, 142 Ohio St. 197, 51 N. E. 2d 645, upholding the validity of similar taxes, based upon local transactions prior to interstate transportation.

While all of the foregoing cases involved interstate commerce, and no case has arisen wholly concerned with foreign commerce since the advent of the modern view, yet those cases are authority in the field of foreign commerce, for the destination has no effect on the character of acts completed in a state. Otherwise the anomalous situation exists, that an act which is local if done where goods are intended for interstate commerce, is not local if done where goods are intended for foreign commerce, and California must accord a discriminatory favor to purchasers of commodities which go to a foreign country instead of a sister state or intrastate. If the imposition of a nondiscriminatory tax upon the privilege of selling, such as is the California sales tax, conditioned upon a sale and the passing of title by delivery within the borders of the state is not a regulation of commerce, nor a burden thereon, forbidden by article I, section 8, clause 3 of the federal Constitution, then it must follow as a matter of course that it is not an "impost" or "duty" on exports within the meaning of article I, section 10, clause 2 of that Constitution. It is to be noted that we do not have before us any form of direct tax on goods intended for export, or on the privilege of

exporting, and the tax is not measured in terms of export or import. The California Retail Sales Tax is a general excise tax on the privilege of selling, a distinctly local activity, as distinguished from a personal property tax or a tax on the sale or because of the sale. Western Lithograph Co. v. State Board of Equalization, 11 Cal. 2d 156, 78 P. 2d 731, 117 A. L. R. 838; Roth Drug, Inc., v. Johnson, 13 Cal. App. 2d 720, 57 P. 2d 1022. To export is to send merchandise from one country to a foreign country. Exportation is the act of sending or carrying merchandise from one country to another. (1 Bouv. Law Dict., Rawle's Third Revision, p. 1161; Black, Law Dictionary.) An export tax falls upon the one who takes the goods out of the country. Krauter v. Menchacatorre, 202 App. Div. 200, 195 N. Y. S. 361. In Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 1095, 29 L. Ed. 257, the court said, "A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine." The California Retail Sales Tax is neither of these. The act of exportation in the case at bar is an immaterial consequence, subsequent to the occurrence of the taxable event, to wit: the transference of title and possession by delivery within the borders of this state. The mere fact that the goods were delivered on board a ship instead of inland to the purchaser does not transmute the fundamental nature of the tax. Furthermore, constitutional history discloses that the primary intent and purpose of article I, section 10, clause 2, was to prevent the seaboard states from benefiting, because of their location, at the expense and to the detriment of the remainder of the states. This much the majority opinion concedes. It was not intended to prevent the imposition of general taxes upon local privileges merely because goods were to be exported. Woodruff v. Parham, 8 Wall. 123, 134, 19 L. Ed. 382; The Federalist, No. 42; Story, Constitution, p. 714 (4th ed.); Warren, Making of the Constitution, p. 557. However, as pointed out in the majority opinion, the prohibition not being limited in terms, has been applied

to exports originating in the seaboard states. Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295. But the attitude of the United States Supreme Court, now recognizing the definitely local attributes of transactions also having foreign consequences, and the right of the states to deal therewith, makes possible more nearly the attainment of the original purposes of the constitutional provision, by preserving the right of the states to impose general taxes not aimed at foreign commerce, even though a state may still be prohibited from directly levying upon its own exports by virtue of the broad terms of the clause.

The majority opinion in reaching a contrary result relies principally upon the case of A. G. Spalding & Bros. v. Edwards, 262 U. S. 66, 43 S. Ct. 485, 67 L. Ed. 865. That case decided back in 1923 is distinguishable in a number of its aspects from the case at bar. The tax was not conditioned upon any local activity of the taxpayer or the consummation of any transaction within a state. It was not imposed by a state government but by the federal government itself, and was an excise tax upon the goods themselves. It was vitiated under article I, section 9, clause 5 of the Constitution. Further, delivery of the merchandise was made by the taxpayer to a common carrier which in turn transported the goods to the purchaser in a foreign port. In the case at bar the purchaser came to this country, received the goods and was thereafter free to take them wherever it chose.

In rejecting appellant's contention that the tax imposed in the case at bar is one imposed on retailers for the privilege of selling, and is not an "impost" or "duty" on exports within the meaning of the constitutional prohibition, the majority opinion cites Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, and Crew-Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295, both of which dealt with license taxes upon importers. In the former case the tax in the form of a license actually and potentially discriminated against domestic products or dealers therein, and in the latter case the tax was measured by gross receipts from sales and not conditioned upon the exercise of the taxpayer's franchise or any other local privilege. Cf.

J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 310, 312, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429; McGoldrick v. Berwind-White Coal Min. Co., supra, 309 U. S. at pages 57, 58, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876. A $3.00 imposition upon wholesale vendors doing business within the state in both internal and foreign commerce was not questioned. It was similarly urged in McGoldrick v. Berwind-White Coal Min. Co. supra, that the conclusion there reached was inconsistent with the line of decisions following Robbins v. Taxing Dist. of Shelby County, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. It was noted that in some instances these taxes were aimed at suppression or placing at a disadvantage interstate business in favor of intrastate sales and otherwise these cases were tacitly disapproved, the court deeming it sufficient to say that the rule of Robbins v. Taxing District of Shelby County, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, had been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate and that the effect on commerce of such a tax was wholly wanting in the present case.

It follows from the foregoing considerations that I cannot agree with my associates in holding that the California Retail Sales Tax on the privilege of selling, which is accomplished within the state, and is nondiscriminatory in its elements, is an "impost" or "duty" within the purview of article I, section 10, clause 2, of the Constitution. Included in such a tax is no evil which the framers of the Constitution could be supposed to have intended to prevent. They were concerned with taxes which might be imposed because of the foreign character of the goods or resulting in the exaction of tribute because of that character. Woodruff v. Parham, supra; Cook v. Pennsylvania, 97 U. S. 566, 574, 24 L. Ed. 1015. To otherwise hold is to disregard the underlying concept of the late cases reviewed herein, recognizing that transactions completed wholly within a state may be so related to privileges which the state is authorized to

grant or deny as to warrant sustaining of their existence solely because of such relationship.

To my mind, it is perfectly absurd to say that the framers of the Constitution of the United States ever contemplated the proscription of such a tax, and it requires a most conservative and strained interpretation of its provisions to arrive at the conclusion reached in the majority opinion.

Simply stated, we have a situation where a product—"oil"—was produced, refined and stored, and finally sold and delivered by plaintiff to a purchaser in California. The plaintiff as such producer has enjoyed the privilege of doing business in California, the protection of its laws, and the service of its governmental agencies. It now seeks to evade the payment of a purely nondiscriminatory excise tax on the privilege of selling its products, under the specious argument that because it is selling such products to a foreign government for foreign consumption, such tax amounts to an impost or duty on exports and is invalid as being a contravention of article I, section 10, clause 2 of the Constitution of the United States. I say without fear of refutation that no court in this country has ever held such a tax invalid under the factual situation here related. It is the modern concept that the tax burden should be distributed in accordance with the benefits received and the ability of the taxpayer to pay, but under the majority decision in this case the plaintiff is escaping its fair share of the tax burden of this state, which means the shifting of its share of such burden to other taxpayers. Furthermore, the effect of this decision will be to permit the oil companies of this state to recover from the state all of the sales taxes which they paid on the huge quantities of oil sold by them to Japan prior to Pearl Harbor, if they have protected their right to such recovery, as I presume they have. Such recovery will no doubt amount to millions of dollars and will have a serious effect upon the revenues of the state. It seems clear to me that such a result should not be reached in the absence of a clear and positive constitutional mandate which is not present in this case.

In my opinion, the judgment should be reversed.

APPENDIX "B"

Second and final decision of the Supreme Court of the State of California, November 1, 1945.

CARTER, J.:

This is an appeal from a judgment for plaintiff in an action to recover retail sales tax paid under protest.

Plaintiff, a corporation, is engaged in producing and selling oil and oil products in California. The New Zealand Government for use by its navy invited offers to sell oil to it for delivery "f.o.b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer." Plaintiff, in the course of its business, submitted an offer with the price quoted f.o.b. ship's rail of buyer's tanker at its storage terminal at Long Beach, California. Pursuant thereto a contract of sale was executed specifying that "(1) Price * * * f.o.b. Los Angeles, payment in London, * * * (3) Delivery shall be given to the order of the Naval Secretary, Navy Office, Wellington, *into* N. Z. *Naval tank steamer* R. F. A. 'Nucula' *at Los Angeles, California.* * * *

"(7). The Richfield Oil Co. shall advance to the Master of the 'Nucula' at Los Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading on each trip, such advance to be repaid when payment is made for the fuel oil.

"(8). Bills of Lading and other customary shipping documents shall be handed to the Master of the 'Nucula' and the oil consigned to the Naval-Officer-In-Charge, Auckland, New Zealand."

Pursuant to the contract plaintiff delivered oil from its storage tanks into the "Nucula" at Long Beach, California. Documents including a bill of lading naming plaintiff as shipper and stating that delivery would be made to the naval officer at Auckland, New Zealand, were delivered to the master of the vessel. Plaintiff also executed a shipper's export declaration, naming it as shipper. The oil reached New Zealand and was paid for in London. It is conceded

that title to the oil passed to the buyer when plaintiff de-delivered it into the tanker at Long Beach, California.

The trial court found the following facts in addition to the foregoing: That oil had never been produced in New Zealand in sufficient quantities for that country's needs, and plaintiff had made other sales of oil to the buyer under similar circumstances; that the parties intended that the oil would be exported to the buyer without interruption.

Clearly, the sale here involved, falls within the provision of the California sales tax law. It levies a tax, measured by gross receipts, on retailers "for the privilege of selling tangible personal property at retail • • •" (Rev. & Tax. Code, §§ 6051, 6052.) The retailers are authorized to collect the tax from the consumers. (Rev. & Tax. Code, §§ 6051, 6052.) A sale is "any transfer of title or possession, • • • in any manner or by any means whatsoever, of tangible personal property for a consideration, • • •" (Rev. & Tax. Code, § 6006.) In the present case the transfer of possession and title took place in California.

In construing the above statutory provisions it has been definitely and squarely held by the courts of this state that:

"The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales." (*Western L. Co.* v. *State Board of Equalization*, 11 Cal. 2d 156, 164 (78 P. 2d 731, 117 A. L. R. 838); see also *National Ice etc. Co.* v. *Pacific F. Exp. Co.*, 11 Cal. 2d 283 (79 P. 2d 380); *De Aryan* v. *Akers*, 12 Cal. 2d 781 (87 P. 2d 695); *Standard Oil Co.* v. *Johnson*, 10 Cal. 2d 758 (76 P. 2d 1184); *Roth Drug Inc.* v. *Johnson*, 13 Cal. App. 2d 720 (57 P. 2d 1022).)

Plaintiff invokes the Constitution of the United States as a bar to the collection of the tax. "The Congress shall have power • • • To regulate Commerce with foreign Nations, and among the several States • • •", (U. S. Const., art. I, § 8, cl. 3). "No Tax or Duty shall be laid on Articles exported from any State." (U. S. Const., art. I,

§ 9, cl. 5.) "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such laws shall be subject to the Revision and Control of the Congress." (U. S. Const., art. I, § 10, cl. 2.)

It should be clear that the sales tax imposed in the instant case does not violate the United States Constitution. There is no discrimination penalizing the sale of goods that are exported to the advantage of sales in local or intrastate transactions. The tax falls equally on all transactions without distinction. The tax is not on export business as such nor on the articles in export. Thus, the only theory upon which it may be said that the tax cannot be applied here is, that the property had already been launched upon its export journey when the sale was consummated and the tax attached to the sale, or, stated another way, the sale was an inseparable part of the exportation and therefore could not be subject to the tax. But here the delivery of the oil which resulted in the passage of title, and the completion of the sale, and the taxable incident, occurred prior to the commencement of the exportation. The delivery of the oil was to the buyer's vessel not a common carrier. The vessel was in California waters and was not bound for any destination until it started to move from the port. It became the property of the buyer before any movement in the channels of commerce occurred. If it had been delivered to a common carrier of export products a different result might be appropriate, for then it would have been placed in the hands of an instrumentality whose *sole purpose* is to export goods, thus indelibly characterizing the process as a part of exportation. Suppose a citizen of Mexico entered this country and purchased a banjo in a store a mile from the border with the unequivocal intent to take it back to Mexico with him and he did so. Would it be doubted that the retailer would be required to pay a tax on the sale? Would the result be any different if the Mexican came by his automobille and either he or the retailer for him placed the banjo in the car? Nor would the conclusion be altered

if he gave the retailer an affidavit that he was taking the banjo to Mexico.

When a general tax is levied on all property alike, goods not intended for export are not immune because they are later exported. (*Brown v. Houston*, 114 U. S. 622 (5 S. Ct. 1091, 29 L. Ed. 257).) Nor are goods exempt from such tax on the ground that they are intended for exportation or manufactured under a contract for export. (*Turpin v. Burgess*, 117 U. S. 504 (6 S. Ct. 835, 29 L. Ed. 988); *Cornell v. Coyne*, 192 U. S. 418 (24 S. Ct. 383, 48 L. Ed. 504).) It has been said that goods exported to a foreign country do not lose their character as a part of the common mass of property in the state from which exported [illegible] have been shipped, or entered with a common [illegible] for transportation to another State, or have begun [illegible] such transportation in a continuous route or [illegible] (*Coe v. Errol*, 116 U. S. 517, 527 (6 S. Ct. 475, 29 L. Ed. 715).) And also that " 'Whenever a commodity has *begun to move* as an article of trade from one State to another, commerce in that commodity between the States has commenced.' " But *this movement does not begin until the articles have been shipped or started for transportation* from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain." (Emphasis added.) (*Coe v. Errol*, *supra*, 528.)

The cases of *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865), and *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (38 S. Ct. 126, 62 L. Ed. 295), do not compel a different result. In the Spalding case the property had commenced its journey by being committed to a common carrier, an instrumentality whose sole function is transportation in commerce. Hence, when it was delivered to the carrier the process of exportation had begun.

In any event both the Spalding case and the Crew-Levick case must be considered as expressing narrow views with reference to the field of state taxation which have been superseded by the recent decisions of the United States Supreme Court. In that connection it should be noted that in the Crew-Levick case, the argument was based upon both the ban against state imposition of imposts on exports and the power over foreign commerce, yet the court treated the case as a proper one for applying the rules applicable to state taxes where interstate commerce is involved. The court stated: "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, * * * is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms." (*Crew-Levick Co. v. Pennsylvania, supra,* 295.) And after discussing authorities dealing with interstate commerce, it is said: "Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned." (*Crew-Levick Co. v. Pennsylvania, supra,* 296; see also *Brown v. Maryland,* 12 Wheat. (U. S.) 419 (6 L. Ed. 678); but see *Sonneborn Bros. v. Cureton,* 262 U. S. 506 (43 S. Ct. 643, 67 L. Ed. 1095).)

The new approach to the problem of the collision between state taxation and interstate commerce has been developed in many authorities. (See *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250 (58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944); *J. D. Adams Mfg. Co. v. Storen,* 304 U. S. 307 (58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429); *Gwin, White & Prince, Inc. v. Henneford,* 305 U. S. 434 (59 S. Ct. 325, 83 L. Ed. 272); *McGoldrick v. Berwind-White Coal Min. Co.,* 309 U. S. 33 (60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876); *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435 (61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229); *Department of Treasury v. Wood Preserving Corp.,* 313 U. S.

62 (61 S. Ct. 885, 85 L. Ed. 1188); *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340 (64 S. Ct. 1019, 1030, 88 L. Ed. 1313); *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, 349 (64 S. Ct. 1023, 1030, 88 L. Ed. 1304, 1319); *General Trading Co. v. Tax Com.*, 322 U. S. 335 (64 S. Ct. 1028, 88 L. Ed. 1309). The essence of these decisions is recognition that not all state taxation is to be condemned because, in some manner, it has an effect upon interstate commerce, and recognition that there may be local activities by a taxpayer within a state, which may be sufficient to support a tax independent of the character of the transaction as a whole, and though the tax may have some incidental effect on other than the purely local or intrastate aspects of that commerce. For illustration in *McGoldrick v. Berwind-White Min. Co., supra*, a New York City tax upon the sale of goods for consumption was upheld as applied where a Pennsylvania corporation engaged in the production of coal in Pennsylvania delivered it to its customers in New York. The tax was held to be conditioned upon events occurring within the state—delivery or the transfer of title or possession. It was said that not all state taxation is to be condemned because, in some manner, it has an effect upon commerce, and it is only when the tax operates to regulate commerce between the states to an extent that infringes the authority of Congress that the tax can be said to exceed constitutional limitations.

In *Department of Treasury v. Wood Preserving Corp.*, 313 U. S. 62 (61 S. Ct. 885, 85 L. Ed. 1188), the Indiana Gross Income Tax Act of 1933 was upheld as applied to a foreign corporation engaged in the business of purchasing railroad ties and selling them to purchasers with whom it had a contract for treating the ties by creosoting them. As to the dealings in question it appeared that the taxpayer purchased and received the ties from local producers in Indiana and sold them to the Baltimore & Ohio Railroad Company, making delivery f.o.b. cars on the railroad tracks in Indiana, pursuant to contract. The ties were then forthwith transported to Ohio for treatment. It was held that the tax was predicated upon local transactions which were none the less intrastate because the ties were intended

for interstate shipment. It was pointed out that the taxpayer did not pay the freight for the transportation and that there was a completed delivery to the railroad company in Indiana.

General Trading Co. v. Tax Com., supra, involved an Iowa use tax. A sale of property was made in Minnesota to Iowa customers, the contract of sale being completed in Minnesota and the goods delivered to a common carrier there for shipment to Iowa.

The case of *International Harvester Co. v. Dept. of Treasury, supra,* concerned an Indiana tax levied on gross receipts from sales, particularly dealing with "(1) sales by out-of-State branches to Indiana dealers and users, where delivery is taken at plants of the corporation in Indiana; (2) sales to out-of-State buyers who come to Indiana, take delivery there, and transport the goods to another State; (3) sales in Indiana to Indiana buyers, where the goods are shipped from out-of-State points to the buyer." (322 U. S. 340.)

Under the foregoing authorities it is perfectly clear that had this been an intrastate transaction it would have been subject to tax. It is inconceivable that the framers of the Constitution ever intended that the export-import clause should be used to discriminate against the states.

Reference is made to *Hooven & Allison Co. v. Evatt,* — U. S. — (65 S. Ct. 870, — L. Ed. —) where Ohio sought to tax property imported by the taxpayer from the Philippine Islands while it was still in its original package and was held by the importer for manufacture. It was held not taxable but the court was particularly concerned with the original package doctrine and by applying it concluded that the importation had not ended. In the instant case the export had not begun and we have no question of the invocation of that doctrine. Moreover, it is difficult to ascertain the precise holding of that case inasmuch as the opinion written by Mr. Chief Justice Stone, held two things: (1) That the shipment from the Philippine Islands was an import because that territory was not a part of this country and hence the provision against imposts on imports applied, and; (2) That the property was not taxable

under that provision. Justices Black, Douglas, Rutledge and Murphy dissented on the second point. Although Mr. Justice Reed apparently joined in the judgment reversing the state court's conclusion of taxability, he dissents on the first issue and his reasoning is of the character generally found in discussions as to the validity of state taxes where interstate commerce is involved.

In the instant case the tax imposed was a uniform nondiscriminatory excise tax on the privilege of doing business in this state. The transaction which was the basis for the tax was the sale of oil which was produced, refined, stored and delivered to the purchaser in this state. The tax imposed was in no sense a tax on exports and became effective before the oil started on its export journey. For these reasons it is clear that the tax was not imposed in violation of any of the provisions of the Constitution of the United States, and is therefore valid.

The judgment is reversed.

Shenk, J., Schauer, J., Spence, J., and Peters, J., pro tem, concurred.

GIBSON, C. J.:

I dissent.

Under the prevailing decisions of the United States Supreme Court the tax imposed in the present case is prohibited by the "import-export" clause of the Constitution of the United States which provides that "No State shall * * * lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. * * *" (Art. I, § 10, cl. 2.) Since the question is entirely one of federal law, we are bound by those decisions.

It is admittedly difficult to ascertain the precise point at which the products of a state which are exported to foreign countries cease to be a part of the general mass of property of that state, subject to nondiscriminatory taxation as such, and become "exports" entitled to the constitutional protection against the imposition of taxes or duties. Clearly, where a general tax is laid on all property alike, goods not then intended for export are not exempt because they hap-

pen to be exported afterwards. (Brown v. Houston, 114 U. S. 622 (5 S. Ct. 1091, 29 L. Ed. 257).) And, goods are not exempt from such taxation merely because they are intended for exportation or manufactured under a contract for export. (*Turpin v. Burgess*, 117 U. S. 504 (6 S. Ct. 835, 29 L. Ed. 988); *Cornell v. Coyne*, 192 U. S. 418 (24 S. Ct. 383, 48 L. Ed. 504).) On the other hand, goods in the actual course of transportation to a foreign destination and goods delivered to a common carrier for that purpose are in the process of exportation and constitutionally cannot be taxed. (*A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865); see *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 175 (38 S. Ct. 432, 62 L. Ed. 1049); *Turpin v. Burgess, supra*, at p. 506; *Coe* v. *Errol*, 116 U. S. 517, 527 (6 S. Ct. 475, 29 L. Ed. 715).) It was said in *Coe v. Errol*, supra, that goods exported to a foreign country do not cease to be part of the common property of the state of their origin for tax purposes until they "have been shipped or entered with a common carrier for transportation * * * or have been started upon such transportation in a continuous route or journey." (*Cf. Railroad Commission v. Texas & P. Ry. Co.*, 229 U. S. 336 (33 S. Ct. 837, 57 L. Ed. 1215); *Texas & N. O. R. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111 (33 S. Ct. 229, 57 L. Ed. 442); *Southern P. Terminal Co. v. Interstate Commerce Com.*, 219 U. S. 498 (31 S. Ct. 279, 55 L. Ed. 310).)

Applying these general principles or formulas to the facts of the present case, it seems reasonably clear that the sale of the oil, under terms requiring delivery to the ship of a foreign government, at which time title passed, was a step in its exportation. The case of *A. G. Spalding & Bros. v. Edwards*, 262 U. S. 66 (43 S. Ct. 485, 67 L. Ed. 865), is particularly pertinent here. In that case a Venezuelan firm requested New York commission merchants to buy certain sporting goods for their account. The commission merchants ordered the goods from plaintiff Spalding, instructing it to deliver the same to a specified exporting carrier in New York addressed to the Venezuelan firm. The plaintiff delivered the goods as directed and received a receipt from the carrier which it sent to the commission merchants,

who exchanged it for a bill of lading in their own name. The commission merchants paid plaintiff and in due time the goods were transported and delivered to the firm in Venezuela. In holding that a tax based on that sale could not constitutionally be imposed upon plaintiff, the court stated, at page 69, in language equally applicable to the case at bar, "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port."

It is true that the Spalding case involved section 9, clause 5, of the Constitution, which prohibits Congress from laying taxes on articles exported from any state, rather than section 10, clause 2, but it has been repeatedly said that the prohibitions of those sections are identical. (*Turpin v. Burgess*, 117 U. S. 504, 506 (6 S. Ct. 835, 29 L. Ed. 988); *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (6 L. Ed. 678).) An effort is made to distinguish that case on the ground that the delivery there involved was to a common carrier, while the delivery in the present case was to the purchaser's carrier. This distinction is one of form rather than substance. Delivery of goods to a common carrier for transportation is regarded as the beginning of the export journey because the destination of the goods is thereby fixed and certain. (*Cf. Turpin v. Burgess; supra*, at p. 507; *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 396 (50 S. Ct. 169, 74 L. Ed. 504); *Coe v. Errol*, 116 U. S. 517, 527 (6 S. Ct. 475, 29 L. Ed. 715).) But delivery of the oil to the "Nucula" in this case as effectively fixed its destination as did the delivery of the goods to the common carrier in the Spalding case. Here, as there, title passed upon delivery, and the passage of title enables the purchaser to change the destination of goods and thereby evade the tax. But, as stated in the Spalding case "There was not the slightest probability of any such change and it did not occur," and "theoretical possibilities may be left out of account." (262 U. S. at p. 70.) The law is not concerned with the means of shipment except

to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. The means selected in this case, in light of all the circumstances, satisfies that inquiry. The only local phase of the sale was the delivery to the carrier in this state, and that delivery was the first step in the exportation. Under the Spalding case, to fix the step at which articles would be exempt from taxation "at any later point would fail to give the exports the liberal protection that hitherto they have received." (262 U. S. at p. 70.)

In some respects it would be more difficult to justify imposition of the tax in the present case than in the Spalding case because here the alleged local transaction was a direct sale to the foreign consumer and the oil was actually loaded aboard the carrier, whereas in the Spalding case the sale was to an intermediary and the goods were merely delivered to the carrier.

The contention that the constitutional prohibition against state taxation of exports does not apply to exports originating in taxing states is answered by the decision in *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (38 S. Ct. 126, 62 L. Ed. 295), where the State of Pennsylvania unsuccessfully sought to tax exports originating in that state. While it may be conceded that article I, section 10, clause 2, was conceived in the desire to prevent the seaboard states from exacting tribute from their sister states (*see Cook v. Pennsylvania*, 97 U. S. 566, 574 (24 L. Ed. 1015); *Woodruff v. Parham*, 8 Wall. (75 U. S.) 123, 134, 135 (19 L. Ed. 382)), the provision is general in its terms.

The prohibition of the federal Constitution, as interpreted by the United States Supreme Court, is not rendered inapplicable on the theory that the California statute levies the tax, not on the sales, but on the local business activities of the seller, and that, therefore, the tax is not an "impost" or "duty" on exports. Although the formal subject of the tax is the "privilege of selling" (Cal. Rev. & Tax. Code, § 6051; see *Western L. Co. v. State Bd. of Equalization*, 11 Cal. 2d 156, 164 (78 P. 2d 731, 117 A.L.R. 838)), it is clear that the actual taxable event is the sale, or transfer of title or possession, and, in any event, the amount of the tax is

expressly measured by gross receipts from sales. (Rev. & Tax. Code, §§ 6006, 6007, 6051.) The United States Supreme Court has stated that in constitutional law cases the formal subject of a tax as declared by a state statute may be disregarded if the tax is in reality on something else, and it has held that taxes purporting to be on local business activities may be unconstitutional if they are in substance on interstate or foreign transactions. (See, for example, *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 439 (59 S. Ct. 325, 83 L. Ed. 272); *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292, 294 (38 S. Ct. 126, 62 L. Ed. 295).) In the Crew-Levick case the court said (p. 294) that "we * * * are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts." The court held that a Pennsylvania license tax of $3, together with "one-half mill additional on each dollar * * * of business transacted annually," which in effect covered both local and foreign business, was unconstitutional because it "operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions (exporting merchandise)." (245 U. S. at p. 297.) In like manner, the California sales tax, measured by gross receipts from sales, cannot be applied to export sales since it would withhold "a part of every dollar received in such transactions."

In the early case of *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (6 L. Ed. 678), where the state argued that a license tax on importers did not contravene article I, section 10, clause 2, since it was a tax on the person rather than the article, the Supreme Court said (at p. 444): "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article * * * is a tax on the article itself. * * * So, a tax on the occupation of an importer is * * * a tax on importation. It must add

to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made." By way of dictum the court announced that a license tax on exporters would likewise contravene the prohibitions of the Constitution. And, in the more recent case of *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (38 S. Ct. 126, 62 L. Ed. 295), it was expressly held that a state license tax on wholesale vendors of merchandise, measured by gross receipts, is in effect an impost on exports when applied to merchandise sold and shipped to customers in foreign countries. (*Cf. United States v. Hvoslef*, 237 U. S. 1 (35 S. Ct. 459, 59 L. Ed. 813); *Fairbank v. United States*, 181 U. S. 283 (21 S. Ct. 648, 45 L. Ed. 865).) Thus, to the extent that the so-called privilege tax is measured by gross receipts from exports, under the existing decisions of the United States Supreme Court it amounts to a tax on exports and is improper.

It is apparent, however, that a new approach has been taken with respect to the problem of state taxation in the field of interstate commerce, and that there are various local activities by a taxpayer within a state sufficient to support a nondiscriminatory tax although the tax may have some incidental effect on interstate commerce. Thus if the present case involved the commerce clause rather than the import-export clause of the federal Constitution, it may be that the tax could properly be imposed, since it falls equally without discrimination, upon all sales in the state, whether the goods are destined for local use or for export. In *Department of Treasury v. Wood Preserving Corp.*, 313 U. S. 62 (61 S. Ct. 885, 85 L. Ed. 1188), for example, an Indiana gross receipts tax was upheld although the goods were sold to an out-of-state buyer and, similar to the situation in the Spalding case, were delivered to a *common carrier* in the taxing state for transportation out of the state. It is somewhat difficult to reconcile these cases upon any other basis than that one concerned foreign commerce and the other interstate commerce.

It does not follow, however, that the views expressed in the Spalding and Crew-Levick cases with respect to imports and exports have been superseded by the interstate com-

merce decisions. The cases relate to different clauses of the Constitution and involve both different language and different purposes and policies. While a few cases have suggested that the prohibitions of the commerce and import-export clauses of the Constitution are substantially identical insofar as taxation is concerned (*Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292, 295 (38 S. Ct. 126, 62 L. Ed. 295); *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (6 L. Ed. 678)), other cases have rejected even an analogy between the two. (*Sonneborn Bros. v. Cureton*, 262 U. S. 506 (43 S. Ct. 643, 67 L. Ed. 1095) (refusing to apply original package doctrine to sales of articles transported in interstate commerce); *Woodruff v. Parham*, 8 Wall. (75 U. S.) 123 (19 L. Ed. 382); cf. *Fairbank v. United States*, 181 U. S. 283, 306 (21 S. Ct. 648, 45 L. Ed. 862).)

The latest decision of the United States Supreme Court involving state taxation of articles in foreign commerce expressly rejects the analogy of the interstate commerce cases. (*Hooven & Allison Co. v. Evatt*, — U. S. — (65 S. Ct. 870, 877, — L. Ed. —).) The state tax there held improper was a general, nondiscriminatory property tax. Although the United States Supreme Court thus had the opportunity to apply the reasoning of the interstate commerce cases, it did not do so, and, further, not even the dissenting opinion discussed the possibility of revising the older cases but, instead, relied upon a factual distinction. (See note (1945) 58 Harv. L. Rev. 858-876.) Until such time as that court determines to permit nondiscriminatory state taxation of sales made in foreign commerce, it would seem improper for a state court to give its approval to such a tax.

The judgment, therefore, should be affirmed.

Edmonds, J., concurred.

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 18 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 864 46

RICHFIELD OIL CORPORATION, A CORPORATION,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF APPELLANT IN REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION

NORMAN S. STERRY,
Counsel for Appellant.

ROBERT E. PARADISE,
LLOYD & PARADISE,
GIBSON, DUNN & CRUTCHER,
Of Counsel.

TOPICAL INDEX

	Page
Judgment of the Supreme Court of the State of California should be held a final judgment within the meaning of Section 237 of the Judicial Code	2
Under provisions of the California Retail Sales Tax Act it is not permissible for Appellant either to amend its Complaint or approve other facts, since under the provisions of the Act it is completely bound by its Claim for Refund	5
The appeal presents the question as to whether the Sales Tax Act as amended, as construed, applied and enforced, is repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States	9
The Constitutional objection here urged was urged by Appellant in and considered by both lower courts	10
The Federal question involved is substantial	14

TABLE OF AUTHORITIES CITED

Cases:

Baird, Estate of, 193 Cal. 225, 234, 223 Pac. 974, 978	6
Clayton v. *Schultz*, 18 Cal. (2d) 328, 332-3, 115 Pac. (2d) 446-8	6
Coats v. *General Motors Corporation*, 11 Cal. (2d) 601, 607, 81 Pac. (2d) 906, 909	6
Cole v. *Violette*, 319 U. S. 581, 582	9
Davis v. *Edmonds*, 218 Cal. 355, 358-9, 23 Pac. (2d) 289-290	6
Department of Banking v. *Pink*, 317 U. S. 264, 268	2, 8, 9
Erie Railroad v. *Purdy*, 185 U. S. 148, 154	14
Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265, 270	11, 12
Metropolitan Water Company v. *Kaw Valley Drainage District*, 223 U. S. 519, 523	2, 6
Monson v. *Fischer*, 219 Cal. 290, 291, 26 Pac. (2d) 6	8
Mower v. *Fletcher*, 114 U. S. 127, 128	3, 4

Page

Radio Station WOW, Inc. v. *Johnson* (not yet officially reported), 65 S. C. 1457, 89 L. Ed. 1397 4
Standard Oil Co. v. *Johnson*, 316 U. S. 481, 483 10
Steelduct Co. v. *Henger-Seltzer Co.* (not yet officially reported), 26 A. C. 640, 647, 160 Pac. (2d) 804, 808 6
United States v. *County of Allegheny*, 322 U. S. 174, 184 13

STATUTES

California Retail Sales Tax Act, Sec. 31 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 864

RICHFIELD OIL CORPORATION, A CORPORATION,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee

BRIEF OF APPELLANT IN REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION

The Appellee has filed a statement opposing the jurisdiction of this Court upon three grounds:

(1) That the judgment of the Supreme Court of the State of California is not final within the meaning of Section 237 of the Judicial Code.

(2) That the case does not involve the federal constitutional validity of a state statute.

(3) The federal question involved is unsubstantial.

While we cannot believe that there is merit in either Appellee's second or third points or that it suggests them

with any serious expectation of their being accepted, the first point presents a very close technical question. Since we desire to reply to that, we shall also briefly answer the Appellee's second and third points.

I

The Judgment of the Supreme Court of the State of California Should Be Held To Be a Final Judgment Within the Meaning of Section 237 of the Judicial Code.

The question as to the finality of the judgment appealed from arises from the fact that it reversed the judgment of the Superior Court without directions. Under California practice that ordinarily requires a retrial.

While for some time the text writers have expressed a doubt as to whether this Court in determining the finality of the judgment of a state court could look beyond the face of that judgment, we interpret the recent decision of *Department of Banking* v. *Pink*, 317 U. S. 264, 268, as a decision that this Court can look at the entire record.

On the entire record the judgment appealed from, we believe, has all the attributes of finality and so conclusively disposes of the federal question involved, which, incidentally, was the only issue litigated in either the Superior or Supreme Court, that we believe under the decision in *Metropolitan Water Company* v. *Kaw Valley Drainage District*, 223 U. S. 519, 523, the judgment of the California Supreme Court should be regarded as one tantamount to a reversal with directions to enter judgment for defendant, and hence final within the purview of Section 237 of the Judicial Code.

There are a great number of decisions of this Court as to what constitutes a final judgment within the meaning of Section 237 of the Judicial Code. We do not believe it

would serve any useful purpose to comment on many of them. They establish two clearcut rules:

(1) The judgment of a state court is not final within the meaning of Section 237 where there is further judicial action to be taken.

(2) Such judgment is final within the meaning of the Section even though the matter is not disposed of, where the further acts are merely ministerial.

The two rules are thus clearly stated in the fairly early case of *Mower* v. *Fletcher*, 114 U. S. 127, 128. There, in denying motions to dismiss appeals from judgments of the Supreme Court of California reversing the judgments of the Superior Court for defendants, with directions to enter judgments as prayed by the complainants, this Court, speaking through the Chief Justice, said:

"That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, and the numerous cases there cited. The judgments in these cases are of that character. The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court which has been rendered into execution. Nothing is left to the judicial discretion of the court below. The cases relied on in support of the motions to dismiss were all judgments or decrees of reversal, with leave for further proceedings in the inferior court. Such judgments are not

final, because something yet remains to be done to complete the litigation."

Mower v. *Fletcher*, 114 U. S. 127, 128.

See, also, to the same effect:

Radio Station WOW, Inc. v. *Johnson* (not yet officially reported), 65 S. C. 1457, 89 L. Ed. 1397.

On page 2 of its Statement Opposing Jurisdiction [1] Appellee states that under the practice in California the Appellant, with permission of the court, could amend its complaint and introduce further and other evidence to support its contention. *This, we believe, is incorrect.*

There is no question that Appellee states the general rule of practice in this state, but under the statutes of this state governing this action the rule is not applicable.

As shown by our Statement as to Jurisdiction,[2] the complaint alleged and the answer admitted (Tr. 11, 27-28) that the oil was delivered to the New Zealand Government Tanker R. F. A. "Nucula" at the marine terminal at Long Beach, California, and that a bill of lading was executed by the Master of the "Nucula" designating the Appellant as shipper and consigning the oil for delivery to the Naval Officer-in-Charge at Auckland, New Zealand, and that the Appellant duly executed and filed a Shipper's Export Declaration.

As to the foregoing facts there was no issue and no evidence offered and none could be since they were established by the verified pleadings of the parties. Obviously as a practical matter they cannot be changed or modified.

Regardless of all practical considerations, under the Retail Sales Act of California governing suits for refund, it would not be permissible for Appellant either to amend its Complaint or prove other facts, since under the provi-

[1] Hereafter referred to as "Objections."

[2] Hereafter for brevity referred to as "our statement."

sions of the Act it is completely bound by its claim for refund.

Under Section 31 of the California Retail Sales Tax Act, in order to sue for the tax the taxpayer is required to file a claim for refund within ninety days, setting forth the grounds on which it is entitled to refund, and it can base a recovery of the tax on no other grounds than those stated.[3]

The claim made by Appellant on the Appellee is attached to and made a part of the Complaint as Exhibit "B" (Tr. 19). It succinctly sets forth the transaction, the call for bids in New Zealand by the New Zealand Government; the acceptance of the bid of Appellant's predecessor; that the contract of sale provided for the delivery of the oil to a New Zealand Tanker f. o. b. Los Angeles (Tr. 23); that pursuant to the agreement the Appellant delivered the oil

[3] The applicable portions of Section 31 of the California Retail Sales Tax Act in force at the time of the filing of the claim for refund and institution of the suit, read:

"No injunction—payment under protest—action to recover.—No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection under this act of any tax sought to be collected and no suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been duly filed as provided in section 23 hereof.

Within ninety days after the mailing of the notice of the board's action upon such claim, the claimant may bring an action against the board *on the grounds set forth in such claim in a court of competent jurisdiction* in the county of Sacramento for the recovery of the whole or any part of the amount with respect to which such claim has been disallowed.

If the board fails to mail notice of action on any such claim within six months after the claim is filed the claimant may, prior to mailing notice of action on such claim by the board, consider the claim disallowed and bring an action against the board on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment. *Failure to bring suit or action within the time specified shall constitute a waiver of any and all demands against this State on account of any alleged overpayments hereunder.*" (Italics are ours.)

More California Retail Sales Tax Act, Sec. 31.

to the New Zealand Tanker "Nucula" at Long Beach, California, and that such fuel oil was exported to Auckland under an Export Declaration filed by Appellant (Tr. 23).

Hence it is apparent that under the statute no grounds of recovery other than those set out in the claim could be advanced by Appellant or considered by the Superior Court on a retrial. The Supreme Court of California in the judgment appealed from has held that the Appellant is not entitled to recover on the ground set forth in its claim for refund. This determination is binding upon both the Superior Court and the Supreme Court of California, neither of which, under the law of California, may hereafter reconsider it.

> "The rule of the law of the case may be succinctly stated as the rule requiring both trial and appellate courts to follow the rules laid down upon a former appeal *whether such rules are right or wrong.*" (Italics are ours.).
>
> Estate of Baird, 193 Cal. 225, 234, 223 Pac. 974, 978.

See, also, to the same effect:

Coats v. *General Motors Corporation*, 11 Cal. (2d) 601, 607, 81 Pac. (2d) 906, 909;

Steelduct Co. v. *Henger-Seltzer Co.* (Not yet officially reported), 26 A. C. 640, 647, 160 Pac. (2d) 804, 808;

Davis v. *Edmonds*, 218 Cal. 355, 358-9, 23 Pac. (2d) 289, 290;

Clayton v. *Schultz*, 18 Cal. (2d) 328, 332-3, 115 Pac. (2d) 446-8.

We submit that the judgment appealed from should be treated as tantamount to a reversal with directions to enter judgment for the defendant.

In *Metropolitan Water Company* v. *Kaw Valley Drainage District*, *supra*, 223 U. S. 519, 523, 56 L. Ed. 533, 535, the appellant, a Kentucky corporation, owned lands in the State

of West Virginia which the appellee sought to acquire for public use. Under the statutes of the state, the appellee petitioned the District Judge to appoint a commission to value the property. The appellant filed a petition to remove the case to the United States Circuit Court, which was denied. Appellant then filed in the United States Circuit Court its bill in aid of a removal. Demurrer was interposed and overruled and a temporary restraining order issued which was reversed by the Circuit Court of Appeal, which remanded the case with directions to proceed in accord with the opinion.[4] On the return of the remittitur, the demurrer was sustained and the bill dismissed and an appeal allowed to this Court, the Circuit Court certifying that it dismissed the bill solely on the ground of want of jurisdiction. The appeal was dismissed on the ground that the judgment of the Circuit Court of Appeals was the final determination of the question Appellant sought to have reviewed and that a petition for certiorari should have been filed to review its decision, this Court saying, in part:

Drainage District, 223 U. S. 519, 523, 56 L. Ed. 533, 535.

> "We need not consider when a writ of certiorari may issue to review decisions on interlocutory orders by the circuit court of appeals, for, in any event, its judgment in the present case must be treated as equivalent to a direction to enter a final decree against the complainant for want of jurisdiction. It is true that the mandate did not in terms make such an order, yet its direction that the circuit court 'should proceed in accordance with the opinion' operated to make the opinion a part of the mandate as completely as though it had been set out at length. Under such a mandate nothing was left for the circuit court to do except to dismiss the bill."

Metropolitan Water Company v. *Kaw Valley*

[4] This direction is identical with the effect of a general reversal in California under the doctrine of the "law of the case."

It seems to us that in reason this case should fall within that rule.

We do not believe that any of the cases cited by the Appellant are in conflict with these views. All three simply announce the general rule that a reversal without direction usually places the case at large, but they all recognize the rule that both the Superior and Appellate Courts are bound by the law of the case. Thus, in *Monson* v. *Fischer*, 219 Cal. 290, 291, 26 Pac. (2d) 6, it is stated:

> "The reversal of the judgment sets the case completely at large *except as restricted by the opinion of the appellate court.*" (Italics are ours.)
>
> *Monson* v. *Fischer*, 219 Cal. 290, 291, 26 Pac. (2d) 6.

None of the cases deals with the situation of the instant case, where under the statute governing the right of action there can be no change or deviation from the grounds of recovery set forth in the claim for refund, by which the Appellant is bound and which the Supreme Court has finally held does not constitute a ground for recovery.

In the recent case of *Department of Banking* v. *Pink*, 317 U. S. 264, 268, 87 L. Ed. 254, 257, this Court said:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether *under local rules of practice the judgment is denominated final* (*Wick v. Superior Ct.* 278 U. S. 575, 73 L. Ed. 515, 49 S. Ct. 94; *Cheltenham & A. Sewerage Co. v. Pennsylvania Pub. Utility Commission*, No. 160, decided October 12, 1942, 317 U. S. 588, post 482, 63 S. Ct. 38), *but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court* (see *Gorman v. Washington University*, 316 U. S. 98, 86 L. Ed. 1300, 62 S. Ct. 962). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to

limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established." (Italics ours.)

Department of Banking v. *Pink*, 317 U. S. 264, 268, 87 L. Ed. 254, 257.

Again, in *Cole* v. *Violette*, 319 U. S. 581, 582, 87 L. Ed. 1599, 1600, this Court said:

"But in determining what is a final judgment or decree within the meaning of Section 237 of the Judicial Code, 28 USCA Sec. 844, 8 FCA Title 28, *Sec. 344, we are not controlled by the designation* applied to it in state practice." (Italics ours.)

Cole v. *Violette*, 319 U. S. 581, 582, 87 L. Ed. 1599, 1600.

Since Appellant is barred by Section 31 of the California Retail Sales Tax Act from asserting on the retrial of the case in the Superior Court any grounds of recovery other than those contained in its Claim for Refund, and since the California Supreme Court has conclusively for all purposes determined that Appellant cannot recover on the Claim for Refund here in litigation, we respectfully submit that the judgment appealed from is final under the foregoing decisions.

II

The Appeal Squarely Presents the Question as to Whether the California Sales Tax Act of 1933, as Amended by the Statutes of 1935, as Construed, Applied and Enforced, is Repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States.

It is true that the California Sales Tax Act contains the exemption set out in the Objections. The exemption, however, is without practical value. The Constitution, as the supreme law of the land, exempts any transactions from the operation of the act upon which it forbids the levying of

a tax. The statute imposes a tax upon all retail sales within this state upon which a tax is not forbidden by either the Federal or State Constitution. To determine whether or not the transaction was exempted by the provisions of the statute, the California Supreme Court necessarily had to determine whether or not the tax was prohibited by the Federal Constitution. That, of course, is a federal question. In sustaining the tax the Supreme Court of California necessarily held that the Appellee had properly construed, applied and enforced the statute of this state, and that so construed, applied and enforced the statute did not violate the Federal Constitution.

On this point, we do not believe this appeal can be distinguished from *Standard Oil Co.* v. *Johnson*, 316 U. S. 481.

That action was to recover gasoline taxes exacted by the State of California upon gasoline sold to United States Army Post Exchanges in California. The act contained a provision expressly exempting motor vehicle fuel sold to the Government of the United States. The dispute was whether sales to the United States Post Exchanges were sales to the Government. The taxes were paid under protest and an action brought to recover them upon the ground (1) that the sales to the Exchanges were exempt from tax; (2) that if construed and applied to require payment of the tax, the act would impose a burden upon instrumentalities or agencies of the United States in contravention of the Federal Constitution. Judgment being rendered in the Superior Court for the defendant and affirmed on appeal, this Court said:

> "Since validity of the State statute as construed was drawn in question on the ground of its being repugnant to the Constitution, we think the case is properly here on appeal under Section 237(a) of the Judicial Code, 28 USCA, Section 344(a)."
>
> *Standard Oil* v. *Johnson*, 316 U. S. 481, 483.

In the instant case, the Appellant sought the recovery of the tax upon precisely the same grounds upon which the Standard Oil Company sought the recovery of taxes it had paid on sales to service stations, viz.:

(1) Under the provisions of the act the sale was exempt.

(2) If the act were applied, construed and enforced so as to require a tax, it was in contravention of Article I, Section 10, Clause 2 of the Constitution of the United States.

In its Objections, Appellee said:

> "A tax statute cannot be contrary to the Constitution when it specifically exempts from the measure of the tax those receipts from sales which the State is forbidden to tax by the Constitution". (Objections, p. 4).

The answer is that the unconstitutionality of the statute is in its application, construction and enforcement.

It would indeed be a strange anomaly if a state could avoid having the validity of one of its statutes under the Federal Constitution determined by this Court by placing in such statute such a general exemption, and then through its officers and courts applying, construing and enforcing the statute so as to ignore the exemption and to impose taxes or other obligations upon its citizens that were clearly prohibited by the Constitution.

A substantially similar contention to the one here urged by Appellee was rejected in *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, 270. The action was instituted by a bill in equity in the state court to enjoin the enforcement of a statute prohibiting anyone from transporting oil by pipe line without paying two cents per barrel. It was charged that if the statute was construed as to impose a tax upon oil moving in interstate commerce it was unconstitutional. The lower court sustained the bill, but the

Supreme Court of the State reversed the decree on the ground that the oil sought to be excluded from taxation was moves in intra- and not interstate commerce. In denying a motion to dismiss an appeal from that judgment, this Court said, speaking through Justice Holmes:

> "But as the court declared that the act should be construed to apply only to commerce within the state, it is urged that there is no jurisdiction here of the writ of error because there is no question as to the validity of a statute so limited. The plaintiff in error also applied for a writ of certiorari, so that the objection would be immaterial were we required to determine upon which proceeding the decree should issue. In view of that necessity we dispose of the matter before going further. Upon the declaration of the court we may conjecture that if it had considered that the oil in question moved in interstate commerce, it would have agreed with the court below, and on this ground it is argued that the mistake, if any, was not in approving the statute, but in the court's conception of interstate commerce. *But we must look at what the court has done, not at its mode of reaching the result.* What it has done is to decide that the statute covers all the oil produced in West Virginia, and that it shall be upheld in so doing. *The nature of the mistake that induced the act is immaterial.* A case would not be withdrawn from the jurisdiction of this court in error by a declaration that a statute was addressed only to intrastate commerce if it was applied wholesale to freight passing across the continent. The fact that the error was less does not affect the principle involved. But, furthermore, the court only confined the statute to intrastate commerce 'as above defined'; that is, to commerce that embraced what the plaintiff carried on." (Italics ours.)
>
> *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, 270, 271.

"'Where a federal right is concerned, we are not bound by the characterization given to a state tax by

state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.' *Carpenter* v. *Shaw*, 280 U. S. 363, 367, 368, 74 L. Ed. 478, 482, 50 S. Ct. 121."

United States v. *County of Allegheny*, 322 U. S. 174, 184.

We are unable to understand the assertion of the Appellee on page 3 of its Objections to the effect that while the validity of the statute was formally challenged by the pleadings, the point was not pressed in the Supreme Court or its validity referred to in the briefs or in the opinion of the Superior or Supreme Court.

No other question was discussed in either court.

An examination of the opinion of the trial court found in the Transcript shows that that was the only question which it considered. Thus, at the outset of the Opinion, it is stated:

"The Plaintiff claims that this was an export sale exempted from tax or impost by the Constitution of the United States. Defendant contends that as the oil was delivered to the purchaser at the port of Long Beach, in California, that the sale was a local sale, consummated in this State and subject to local law" (Transcript, p. 53).

An examination of both the majority and minority opinions of the California Supreme Court in both its first and second decisions will show that no other question was considered or discussed. The Conclusion of Appellant's (respondent below) Brief in the California Supreme Court reads as follows:

"* * * We submit that it is apparent from the entire act as well as from the specific exemption of Section 5 that it was never intended that the Act should be applicable to such a transaction. *It is equally clear*

that if so applied, the Act, so construed, would be in contravention of the Federal Constitution.

"We very respectfully, but very confidently submit that the tax levied by the appellant Board was invalid both because it was exempted from the Sales Act and was clearly forbidden by the Federal Constitution. We submit that on each of these grounds, the judgment appealed from must be affirmed." (Emphasis supplied.)

It is quite true that the opinions of the Supreme Court do not use the formal phrase to the effect that the statute was "applied, construed and enforced," employed in the pleadings and in our Brief. The Opinions do show that the only question considered was the validity of the tax under the Constitution. The observations of Justice Harlan in speaking for this Court in *Erie Railroad* v. *Purdy*, 185 U. S. 148, 154, are most pertinent:

"* * * Of course, if upon examining the record this court had found that a Federal question was properly raised, or that a Federal right or immunity was specially claimed, in the trial court, then our jurisdiction would not have been defeated *by the mere failure of the highest court of the state to dispose of the question so raised, or to pass upon the right or immunity so claimed.*" (Italics ours.)

Erie Railroad v. *Purdy*, 185 U. S. 148, 154.

III

The Federal Question Involved Is Substantial

We cannot take seriously the Appellee's third point, that the federal question involved is not substantial. As to that point we are more than satisfied to stand on our Statement.

However, we may point out:

(1) That the seriousness of the federal question involved and the grave doubt of the correctness of the last decision of the Supreme Court of California are demonstrated by:

(a) The fact that the Superior Court reached the conclusion that the tax was one upon an export and hence prohibited by the Federal Constitution.

(b) The fact that the Supreme Court itself reached that conclusion in its first consideration of the case.

(c) The fact that its last and final decision is by division of the court.

We believe that a reading of the dissenting opinion of the Chief Justice, concurred in by Justice Edmonds, will convince anyone that if the majority opinion is not clearly erroneous, at least the correctness of its views is highly debatable.

(2) On page 5 of its Objections Appellee says: "* * * transactions of the character involved here are comparatively rare." It is difficult to reconcile this with Appellee's conclusion (pages 7 and 8 of Appellee's Objections):

> "California oil companies have sold petroleum products to various foreign purchasers. Excluding sales where the California vendor made delivery in its own tankers and excluding sales where delivery was made by common carrier, taxes aggregating more than $1,700,000 have been assessed on sales of this character by appellee."

Since the amount of the tax levy represents but three per cent of the total gross price, the amount involved would

indicate that the method of exportation disclosed in this case is a normal and ever recurring one.

Respectfully submitted,

NORMAN S. STERRY,
Counsel for Appellant.

ROBERT E. PARADISE,
LLOYD & PARADISE;
GIBSON, DUNN & CRUTCHER,
Of Counsel.

(3254)

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 27 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1946
No. 46

RICHFIELD OIL CORPORATION, a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee.

APPELLANT'S OPENING BRIEF.

NORMAN S. STERRY,
1000 Banks-Huntley Building, Los Angeles 14, Calif.,
ROBERT E. PARADISE,
610 Title Insurance Building, Los Angeles 13, Calif.,
Counsel for Appellant.

GIBSON, DUNN & CRUTCHER,
LLOYD & PARADISE,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

SUBJECT INDEX.

PAGE

References to the official reports of the opinions of the Supreme Court of the State of California 1

Statement of the grounds upon which the jurisdiction of this court is invoked 2

Finality of the judgment of the Supreme Court of California within the meaning of Section 237 of the Judicial Code 6

Statement of the case 18

Specifications of the assigned errors intended to be urged by appellant 22

Summary of argument 26

Argument 32

I.

The Supreme Court of California erred in its decision that no exportation of the oil commenced until after the "Nucula" had started from the marine terminal to New Zealand 34

II.

The Supreme Court of the State of California erred in its determination that the power of the State to tax exports is coextensive with its power to tax interstate commerce and that because the tax here levied was nondiscriminatory it did not violate the unqualified constitutional prohibition against taxation of imports or exports 56

III.

The Supreme Court of the State of California erred in determining that the tax could be sustained as an excise tax for the privilege of conducting a retail business in California 66

Conclusion 72

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Almy v. California, 24 Howard 169	70
American Steel & Wire Co. v. Speed, 192 U. S. 500	61, 62, 70
Anderson v. Aronsohn, 63 Cal. App. 737, 219 Pac. 1017	8
Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218	69, 71
Baird, Estate of, 193 Cal. 225, 223 Pac. 974	8, 15
Blount v. Munroe, 60 Ga. 61	34, 54
Boston etc. Company v. Rosenthal, 68 Cal. App. (2d) 564, 156 P. (2d) 963	39
Brett v. S. H. Frank & Company, 162 Cal. 735, 124 Pac. 437	8
Brown v. Maryland, 12 Wheat. 419	67, 68, 69
Carson Petroleum Co. v. Vial, 279 U. S. 95	41, 49, 53
Central Savings Bank of Oakland v. Lake, 201 Cal. 438, 257 Pac. 521	6
Chicago etc. Co. v. Perry, 259 U. S. 548	5
Clark v. Williard, 292 U. S. 112	15, 16
Clarke & Co. v. Clarke, 3 Woods 408, Fed. Cases No. 2846, p. 943	35, 36, 54, 64
Clayton v. Schultz, 18 Cal. (2d) 328, 115 P. (2d) 446	8
Coats v. General Motors Corporation, 11 Cal. (2d) 601, 81 P. (2d) 906	9
Coe v. Errol, 116 U. S. 517	48, 49, 51
Cook v. Pennsylvania, 97 U. S. 566	34, 64
Crew Levick v. Pennsylvania, 245 U. S. 292	64, 70, 71
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	5
Davis v. Edmonds, 218 Cal. 355, 23 P. (2d) 289	9
Department of Banking v. Pink, 317 U. S. 264	7
Department of the Treasury v. Wood Preserving Corporation, 313 U. S. 62	29, 56, 57, 58

PAGE

Erlin v. National Union Fire Ins. Co., 7 Cal. (2d) 547, 61 P. (2d) 756 6

Erie Railroad Company v. Purdy, 185 U. S. 148 6

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265 5

Fairbanks v. United States, 181 U. S. 283 ..... 37, 60

First National Bank v. Anderson, 269 U. S. 341 5

Globe Varnish Company, In re, 114 F. (2d) 916 ..... 39, 41

Gulf Refining Company v. United States, 269 U. S. 125 ..... 12, 14

Hooven & Allison Co. v. Evatt, 324 U. S. 652 ..... 40, 59, 61, 69

Hughes Bros. Timber Co. v. Minnesota, 272 U. S. 469 ..... 47, 53

International Harvester Company v. Department of Treasury of Indiana, 322 U. S. 340 ..... 29, 58

Kahn v. Royal Indemnity Company, 63 Cal. App. 278, 218 Pac. 444 8

Low v. Austin, 13 Wall. 29 ..... 61, 63, 69

Market Street Railway Company v. Railroad Commission, 324 U. S. 548 ..... 4, 11

Martyn v. Western Pacific Railway, 21 Cal. App. 589, 132 Pac. 602 39

McGoldrick v. Berwind-White Coal Mining Company, 309 U. S. 33 57

Metropolitan Water Company v. Kaw Valley Drainage District, 223 U. S. 519 12

Moody & Sons v. Century Savings Bank, 239 U. S. 374 12

Monson v. Fischer, 219 Cal. 290, 26 P. (2d) 6 6

Mower v. Fletcher, 114 U. S. 127 11

Murdock v. Pennsylvania, 319 U. S. 105 ..... 62, 63, 67

Nelson Bros. Coal Co. v. Berryman, 48 F. (2d) 99 39

N. Y. and Cuba Mail S. S. Co. v. United States, 125 Fed. 320 37

Nickey v. State of Mississippi, 292 U. S. 393 5

Nippert v. City of Richmond (not yet officially reported), 90 L. Ed. 496 ..... 54, 55, 58

PAGE

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90.. 38
Railroad Commission v. Worthington, 225 U. S. 101..... 50
Railroad Commission of Louisiana v. Texas etc. Co., 229 U. S. 336 .....53, 54
Richfield Oil Corporation v. State Board of Equalization, 27 A. C. 150, 163 P. (2d) 1..... 4
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498..... 53
Sonneborn Bros. v. Keeling, 262 U. S. 506..... 60
Spalding & Brothers v. Edwards, 262 U. S. 66.....
.....28, 39, 41, 43, 44, 53, 59
Standard Oil Co. v. Johnson, 56 Cal. App. (2d) 411, 132 P. (2d) 910 62
Standard Oil Company v. Johnson, 316 U. S. 481.....4, 62
State Board of Equalization v. Blind Bull Coal Co., 101 P. (2d) 70 62
Steelduct Co. v. Henger-Seltzer Co., 26 Cal. (2d) 634, 160 P. (2d) 804 9
Sully v. American National Bank, 178 U. S. 289..... 5
Texas & New Orleans Railroad Company v. Sabine Tram Company, 227 U. S. 111.....51, 53
Thames & Mersey Insurance Company v. United States, 237 U. S. 19..... 37
United States v. County of Allegheny, 322 U. S. 174.....
.....5, 6, 12, 59, 62, 65
United States v. Hvoslef, 237 U. S. 1.....37, 69
Washington Chocolate Co. v. King County, 152 P. (2d) 981..... 62
Western Oil Refining Company v. Lipscomb, 244 U. S. 346....50, 51
Whitfield v. Ohio, 297 U. S. 431..... 5
Willcuts v. Bunn, 282 U. S. 216..... 37
Wm. E. Peck & Co. v. Lowe, 247 U. S. 165..... 70
Wisconsin v. J. C. Penney Company, 311 U. S. 435.....29, 56, 57

PAGE

Woodruff v. Parham, 8 Wall. 123 60
Young v. Southern Pacific Company, 189 Cal. 746, 210 Pac. 259 8

STATUTES.

California Retail Sales Tax Act of 1933, Chap. 1020 (Stats. 1933 as amended by Stats. 1935, Chaps. 351, 355, 357) 2, 22, 23, 56
California Retail Sales Tax, Sec. 5 2
California Retail Sales Tax Act, Sec. 23 ..... 9, 10
California Retail Sales Tax Act, Sec. 31 ..... 9, 10
California Rules on Appeal, Rule 24 4
United States Constitution, Art. I, Sec. 10, Clause 2 ..... 22, 23, 25, 26, 30, 32, 36, 56, 59, 63
Judicial Code, Sec. 237 4
40 U. S. Stats. at Large, 300 41

TEXTBOOKS.

43 Columbia Law Review (1943), pp. 1002, 1004 16
48 Harvard Law Review (1934-35), pp. 302, 303-4, 308-9 17

INDEX TO APPENDIX.

PAGE

Provisions of the Retail Sales Tax Act of 1933, as amended:

Sec. 2. Definitions. (Deering's General Laws of California, 1935 Supplement, pp. 1956 and 1957) 1

Sec. 3. Rate of tax. Deering's General Laws of California, 1935 Supplement, pp. 1957 and 1958) 4

Sec. 5. Exemptions. (Deering's General Laws of California, 1935 Supplement, p. 1958) 4

Sec. 8. Unlawful to advertise absorption of tax. (Deering's General Laws of California, 1937, Vol. 2, p. 3895) 5

Sec. 8½. Retailer to collect tax. (Deering's General Laws of California, 1937, Vol. 2, p. 3895) 5

Sec. 12. Retailer's permit: Application: Violation of section a misdemeanor. (Deering's General Laws of California, 1937, Vol. 2, pp. 3896 and 3897) 5

Sec. 13. Permit fee. (Deering's General Laws of California, 1937, Vol. 2, p. 3897) 6

Sec. 15. Life of permit: Renewal fee. (Deering's General Laws of California, 1935 Supp., p. 1959) 6

Sec. 23. Overpayments: Credits and refunds: Claims: Interest: Recovery of erroneous refunds and credits: Illegal levies: Intentional overpayments. (Deering's General Laws of California, 1941 Supp., pp. 2321 and 2322) 7

Sec. 31. Remedies of taxpayer: Action to recover tax paid: Prerequisites to action: Time for commencement: Execution of judgment: Assignees. (Deering's General Laws of California, 1939 Supp., p. 1589) 8

IN THE

Supreme Court of the United States

October Term, 1946

No. 46

RICHFIELD OIL CORPORATION, a corporation,

Appellant,

vs.

STATE BOARD OF EQUALIZATION,

Appellee.

APPELLANT'S OPENING BRIEF.

References to the Official Reports of the Opinions of the Supreme Court of the State of California.

Neither the first nor second decision of the Supreme Court of California has been officially reported at the time of writing this brief. The first decision of the Court is unofficially reported in 155 P. (2d) 1, and is found in the Record at pages 71-85. Its second and final decision rendered after a rehearing is unofficially reported in 27 A. C. 150, 163 P. (2d) 1, and is found in the Record at pages 85 to 98.

Statement of the Grounds Upon Which the Jurisdiction of This Court Is Invoked.

The suit was instituted by appellant to recover a tax which the appellee had levied upon a cargo of fuel oil sold to the New Zealand Government Stores Control Board (hereinafter for brevity referred to as the "Control Board") for exportation by a vessel of the New Zealand Government to the Naval Officer in Charge at Auckland, New Zealand, which oil was so exported [Compl. V-X, R. 2-9]. All averments of the complaint, other than that the sale was an export sale and the tax one upon an export, were admitted by the answer [R. 16-17].

The tax was levied under and by virtue of the California Retail Sales Tax Act of 1933, Chapter 1020, California Statutes of 1933 as amended by Chapters 351, 355 and 357, California Statutes of 1935 (for brevity sometimes hereinafter referred to as the "Sales Tax Act"). In its final opinion the Supreme Court of California has referred to the sections of the California Revenue and Taxation Code in which that Act was incorporated subsequent to the sale here involved. The applicable sections of the Act in force at the time of the sale are attached as an appendix to this brief. Concisely, the statute levied a tax of three per cent on the gross receipts of any retail sale of personal property in California, and Section 5 of the Act specifically exempted the sales upon which a tax was prohibited either by the Constitution of the United States or of California.

In Paragraph IX of the complaint it is alleged:

> "That if the California Retail Sales Tax Act, as amended, be construed, applied or enforced in

such manner to impose said tax upon said sale of fuel oil hereinabove described, the said California Retail Sales Tax Act is invalid, illegal and unenforceable and contrary to and in violation of the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States of America." [R. 9.]

Precisely the same charge was made in the Claim for Refund [R. 15].

The trial court reached the conclusion [R. 65]:

> "That if the said California Retail Sales Tax Act as amended be construed, applied or enforced in such manner as to impose a tax upon said sale of fuel oil hereinbefore described, said Act is invalid, illegal and unenforcible, in that it is contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States." [R. 65, Conclusions of Law IV.]

Judgment was entered for the appellant [R. 65].

The Appellee Board appealed to the Supreme Court of California which affirmed the judgment [155 P. (2d) 1; R. 71-78], Justice Carter dissenting [155 P. (2d) 1, 5-9; R. 79-85]. A rehearing was granted and the judgment appealed from was reversed. The final opinion of the Supreme Court reversing the judgment of the trial court was rendered on November 1, 1945 [163 P. (2d) 1; R. 85-92], the Chief Justice and Justice Edmonds dissenting

[163 P. (2d) 1, 5-8; R. 92-98]. In its final opinion the majority of the California Supreme Court said:

> "Plaintiff invokes the Constitution of the United States as a bar to the collection of the tax. * * * 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, * * *'.
>
> "It should be clear that the sales tax imposed in the instant case does not violate the United States Constitution."
>
> *Richfield Oil Corporation v. State Board of Equalization,* 27 A. C. 150, 152, 163 P. (2d) 1, 2. [R. 87.]

On November 29, 1945, a rehearing was denied, and the Supreme Court of California thereafter had no power to review or modify its decision. See:

Rule 24, *California Rules on Appeal;*

Market Street Railway Company v. Railroad Commission, 324 U. S. 548.

An appeal to this Court was duly allowed by the Chief Justice of the Supreme Court of the State of California on January 17, 1946 [R. 103, 104].

Since both in the complaint and in its claim for refund appellant directly charged that the Sales Tax Act, if construed, applied or enforced so as to impose a tax on the said sale, was in contravention of the Federal Constitution, this Court under Section 237 of the Judicial Code has jurisdiction of the appeal. See:

Standard Oil Company v. Johnson, 316 U. S. 481, 482-3;

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 289;

First National Bank v. Anderson, 269 U. S. 341, 345-6;

United States v. County of Allegheny, 322 U. S. 174, 192.

Such jurisdiction of the appeal also attaches because it appears from the face of the opinion of the court below that the constitutionality of the statute as construed and applied was involved and considered by it. See:

Chicago etc. Co. v. Perry, 259 U. S. 548, 551;

Sully v. American National Bank, 178 U. S. 289, 298;

Nickey v. State of Mississippi, 292 U. S. 393, 394;

Whitfield v. Ohio, 297 U. S. 431, 435-6.

Appellee, in its Statement in Opposition to Jurisdiction, asserts on pages 3 and 4 that the appeal does not involve the validity of a state statute. This is based upon the contention that the statute cannot be in violation of the Federal Constitution since it expressly exempts sales the taxation of which are forbidden by the Federal Constitution. The answer is that the California Supreme Court in its last and final decision construed the statute as not exempting the tax upon the sale here involved, and this decision presents the constitutional question as to whether the statute as so construed, enforced and applied, is repugnant to the Federal Constitution. See:

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 270;

United States v. County of Allegheny, supra, 322 U. S. 174, 184;

Erie Railroad Company v. Purdy, 185 U. S. 148, 154.

Brief which we were permitted to file in answer to the Statement in Opposition to Jurisdiction (hereafter for brevity referred to as "our brief"), pp. 9-14, where the point is more fully discussed and pertinent portions of the above cited decisions quoted.

THE JUDGMENT OF THE SUPREME COURT OF CALIFORNIA WAS FINAL WITHIN THE MEANING OF SECTION 237 OF THE JUDICIAL CODE.

As the question of the jurisdiction of this Court was reserved for argument on the merits, we take the liberty of somewhat amplifying our brief on the point of the finality of the judgment.

Unless otherwise noted, all emphasis throughout this discussion and our argument on the merits will be ours.

The appellee filed a Statement in Opposition to Jurisdiction in which it took the position that the judgment of the Supreme Court of California was not final because it reversed the case without directions, citing:

Central Savings Bank of Oakland v. Lake, 201 Cal. 438, 443, 257 Pac. 521, 523;

Monson v. Fischer, 219 Cal. 290, 291, 26 P. (2d) 6;

Erlin v. National Union Fire Ins. Co., 7 Cal. (2d) 547, 549, 61 P. (2d) 756, 757.

While these cases sustain the proposition that ordinarily in California a reversal without directions leaves the case at large with the right in the parties to amend the pleadings or present different proof, this procedure is not open in the case at bar. In this particular case nothing remains but the ministerial entry by the trial court of a judgment for defendant.

In determining the finality of the judgment appealed from, this Court may examine the record presented to it. See:

Department of Banking v. Pink, 317 U. S. 264, 268.

The opinion of the trial court speaks of the facts as being stipulated to [R. 32]. However, an examination of the stipulations [R. 18-20; 31-32; 66-67] will show that they are only supplemental to the facts alleged in the complaint, merely attaching and setting forth the various documents referred to in the pleadings and in the claim for refund, and that the sale on which the tax was levied was the second of two sales under a contract between appellant's predecessor in interest and the Control Board; that the appellant started pumping the oil from its tank farm to the storage tanks at Marine Terminal on receipt of wireless message of the approach of the "Nucula," and the oil was pumped from the latter tanks into the "Nucula" as soon as the vessel was ready to receive it [R. 18-19]. All the essential facts which appellant claims constituted an export sale within the meaning of the constitutional prohibition against a state tax thereon are set forth in the complaint and also in its claim for refund. [Compl. VI, VII, R. 4-8, Ex. "B",

R. 11-15], and are admitted by the answer [Ans. I-V, R. 16-17].

The California Supreme Court in its last and final opinion based its decision upon the facts alleged in the complaint and the claim for refund, and held that as a matter of law those facts did not disclose an export sale within the meaning of the Federal Constitution, and that the conclusion of the trial court heretofore quoted [R. 64-65], to the effect that if the act were construed or applied as imposing a tax upon the sale it was in contravention of the Constitution, was erroneous. Under the law of California this decision has become the law of the case and may not be reexamined either by the Superior Court or the Supreme Court of California.

> "The rule of the law of the case may be succinctly stated as the rule requiring both trial and appellate courts to follow the rules laid down upon a former appeal *whether such rules are right or wrong.*"
>
> *Estate of Baird*, 193 Cal. 225, 234, 223 P. 974, 978. (Cited in our brief, p. 6.)

See, also, to the same effect:

Clayton v. Schultz, 18 Cal. (2d) 328, 332-3, 115 P. (2d) 446, 447-8;

Young v. Southern Pacific Company, 189 Cal. 746, 749, 210 P. 259, 264;

Brett v. S. H. Frank & Company, 162 Cal. 735, 739, 124 P. 437, 439;

Anderson v. Aronsohn, 63 Cal. App. 737, 744, 219 P. 1017, 1020;

Kahn v. Royal Indemnity Company, 63 Cal. App. 278, 281-2, 218 P. 444, 446;

Coats v. General Motors Corporation, 11 Cal. (2d) 601, 607, 81 P. (2d) 906, 909;

Steelduct Co. v. Henger-Seltzer Co., 26 Cal. (2d) 634, 642-4, 160 P. (2d) 804, 808;

Davis v. Edmonds, 218 Cal. 355, 358-9, 23 P. (2d) 289, 290.

From the facts admitted by the pleadings and stipulated to by the parties, it is apparent there is nothing to retry, even if this were an action prosecuted under the general laws of the State of California. However, the action is not one brought under the general laws of the State. Being against the State, it can be instituted only in the way and manner permitted by the State. Under Sections 23 and 31 of the California Retail Sales Tax Act, the taxpayer was prohibited from enjoining the payment of any levy, his only remedy being to pay the tax under protest and thereafter to file a claim for refund setting forth "the specific grounds upon which the claim is founded," and in the event the claim was denied, to bring suit *within ninety days on the grounds set forth in his claim for refund.*[1]

---

[1]The applicable portions of Sections 23 and 31 of the Retail Sales Tax Act in force at the time of the filing of the claim for refund and institution of the suit read:

Section 23: "* * * No refund shall be allowed unless a claim therefore is filed with the State Board of Equalization. * * * Every such claim must be in writing and must state the specific grounds upon which the claim is founded. * * *"

Section 31: "* * * No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection under this act of any tax sought to be collected and no suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed

While it is apparent that if this were an action under the general laws of this state there would be no practical possibility of the appellant amending its complaint or presenting any other or different facts, *under the statute it is legally impossible for it so to do.* The decision of the Supreme Court of the State of California that the facts set out in the claim for refund and upon which the suit was based did not constitute an export sale, and that construing and applying the California Retail Sales Tax Act as requiring a tax on that sale does not render the statute repugnant to the Federal Constitution, is a final and conclusive determination not only of that question but of the entire case. No other or further evidence can be taken; no other or further issues can be raised or tried. There remains nothing for the trial court to do but to perform the ministerial task of entering judgment for the defendant.

---

or collected unless a claim for refund or credit has been duly filed as provided in section 23 hereof.

"*Within ninety days after* the mailing of the notice of the board's action upon such claim, the claimant may bring an action against the board *on the grounds set forth in such claim in a court of competent jurisdiction in the county of Sacramento* for the recovery of the whole or any part of the amount with respect to which such claim has been disallowed.

"If the board fails to mail notice of action on any such claim within six months after the claim is filed the claimant may, prior to mailing notice of action on such claim by the board, consider the claim disallowed and bring an action against the board on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment. *Failure to bring suit or action within the time specified shall constitute a waiver of any and all demands against this State on account of any alleged overpayments hereunder.*" (Italics are ours.)

California Retail Sales Tax Act, Secs. 23 and 31.

We again call the Court's attention to its early decision in *Mower v. Fletcher*, 114 U. S. 127, 128, cited and quoted from in our brief, pages 3-4, wherein it is said, in part:

> "That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered."
>
> *Mower v. Fletcher*, 114 U. S. 127, 128.

The observations of this Court in *Market Street Railway Company v. Railroad Commission, supra*, 324 U. S. 548, 551, are most pertinent:

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, §237, 28 U. S. C. §344. Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.
>
> "We have held that finality of a judgment of a state court for determining the time within which our jurisdiction to review may be invoked *is not controlled by the designation applied in state practice.* Department of Banking v. Pink, 317 U. S. 264; Cole v. Violette, 319 U. S. 581. *The judgment for our purposes is final when the issues are adjudged.*"
>
> *Market Street R. Co. v. Railroad Commission of California*, 324 U. S. 548, 551.

Tested by the rule of the last two cases above quoted, the last judgment of the Supreme Court of California is certainly final. It is the judgment of the court of last resort of the state. It has finally adjudged all the issues, and no California court can further review or modify that judgment. Under that judgment, the Superior Court has no discretion other than to enter judgment for the defendant on the pleadings. If this Court reverses the judgment of the Supreme Court of California, that tribunal would have nothing to do other than to execute the judgment of this Court by issuing its remittitur affirming the judgment of the Superior Court in favor of plaintiff. If this Court should affirm the judgment of the Supreme Court of California, there would be no further action by the Supreme Court of California, and the Superior Court, acting under the judgment appealed from, would be without discretion to take any action other than entering judgment for the defendant.

See, also:

Metropolitan Water Company v. Kaw Valley Drainage District, 223 U. S. 519, 523. (Cited and quoted from in our brief, pp. 6-7);

Moody & Sons v. Century Savings Bank, 239 U. S. 374, 376;

United States v. County of Allegheny, supra, 322 U. S. 174, 192.

In *Gulf Refining Company v. United States* 269 U. S. 125, 135-6, suit was instituted in the Federal District Court to quiet title to land and for an accounting for oil taken from the land. After a decision by this Court settling the title and remanding the case for an accounting, the parties filed a written stipulation that if the

Court should hold that the plaintiff was entitled to recover the net value of the oil produced after January 1, 1918, judgment should be entered for a certain amount, and further that the total value of all the fuel produced from the beginning of operations until the abandonment of the land was less than the cost of production. The Court entered judgment that the government take nothing, and on appeal the Circuit Court of Appeals reversed the judgment holding that the defendants were not entitled to offset any part of the costs of production prior to January 1, 1918. On appeal to this Court, the government contended this Court was without jurisdiction because the judgment of the Circuit Court of Appeals was not final. In denying that contention, this Court said:

> "But the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length. Metropolitan Water Co. v. Kaw Valley District, 223 U. S. 519, 523. Under the stipulations above recited, the trial court was bound to enter decrees for the government for the stated sums of money if that court found that the government was entitled to recover the net value of the oil produced. The trial court found that the government was not so entitled and the decrees went accordingly. Turning to the opinion, it will be seen that the circuit court of appeals decided that the trial court erred 'in entering the decrees denying the complainant the right to recover the net value of the oil, etc.' The instruction for further proceedings not inconsistent with the opinion, therefore, was equivalent to a direction to render judgment for the net value—that is, for the exact sums set forth in the stipulation. See Moody v. Century Bank, 239

U. S. 374, 376; Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 241. *There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the power of alteration. It follows that the jurisdictional objection is without merit.*"

Gulf Refining Co. v. United States, 269 U. S. 125, 135-6.

We submit that the status of the judgment appealed from in the above case as to finality is identical with the status of the judgment appealed from in the instant case. Here, as there, no evidence can be taken at a retrial, all of the incidental facts not admitted by the pleadings having been stipulated to by the parties. As we have pointed out, under the provisions of the California Retail Sales Tax Act, any change of issue would be as legalistically impossible as it would be practically impossible. While it is true that the California Supreme Court reversed the judgment of the trial court without direction, nevertheless, the opinion of the majority of the court below decided every issue in the case, and under the decision of the majority of the court below the trial court is as devoid of any discretion to render a judgment other than for the defendant as it would be if the opinion had specifically directed the entry of such judgment or the trial court to proceed in conformity with the opinion.

"It was no part of the trial court's function to determine whether the former appeal had been cor-

rectly decided; *its sole duty was to follow without question the principles established by that decision.*"

Estate of Baird, supra, 193 Cal. 225, 258.

In *Clark v. Williard,* 292 U. S. 112, 117-118, the controversy was between the petitioner as receiver of a foreign corporation and the respondent as trustee of certain judgment creditors, the respondent having intervened in the receivership matter by petition for leave to have execution issued upon a final judgment rendered in the state court. The District Court of Montana adjudged that petitioner was the successor to the corporation, and that its assets should be ratably distributed, and denied the petition. On appeal, the Supreme Court of Montana held that the assets were subject to attachment and execution, and reversed the order, remanding the case to the court, "for further proceedings in accordance with the opinion." In sustaining the jurisdiction of this Court to entertain writ of error, this Court, speaking through Justice Cardozo, said:

"Our jurisdiction to issue the writ is challenged on the ground that the decree to be reviewed is without the requisite finality. Judicial Code, §237; 28 U. S. C., §344. The challenge should not prevail. The decree of the Montana court is final to the extent that it confirms the respondents' execution and permits a levy that will override the liquidator's title. * * * By that opinion, which by reference was incorporated in the judgment

(Metropolitan Water Co. v. Kaw Valley District, 223 U. S. 519, 523; Gulf Refining Co. v. United States, 269 U. S. 125, 135), nothing was left to the discretion of the trial court in respect of the priority of the execution or of the respondents' rights thereunder."

Clark v. Williard, 292 U. S. 112, 117-118.

The above decision of this Court has been the subject of analysis and comment by at least two law reviews, both of which interpret the decision as permitting review by this Court of judgments of the status of the one here appealed from.

"Clark v. Williard marks a cleavage with this earlier line of authorities. In that case the state court judgment recited: 'For reasons stated in the opinion the judgment and orders appealed from are reversed and the cause remanded for further proceedings in accordance with the views expressed in the opinion.' Relying upon federal court precedents, the Court held that the judgment incorporated the opinion by reference, and that jurisdiction under Section 237 could be sustained since the opinion established that the case had been finally disposed of. *This is a sensible result which hardly seems to create any practical difficulties.* If the opinion and judgment, considered as a unit, show beyond doubt that, so far as the state courts are concerned, the controversy is wholly at an end, *it serves neither the ends of justice nor the purpose of the final judgment rule to require that review by the Supreme Court be postponed.*"

43 Columbia Law Review (1943), 1002, 1004.

"A judgment reversing a lower court and remanding the case for further proceedings has often been held not final. Nor is the rule changed if the remand is solely for the purpose of fixing damages. But a reversal will be considered final *which leaves but one eventuality open to the lower court, since to postpone an appeal until after the performance of purely ministerial functions below delays review unnecessarily with no countervailing advantage to the Court.*

"* * * * * * * *

"Suggestion has been made that the Court be empowered to review as a matter of discretion at any stage in the proceedings, but petitions for certiorari are perhaps too numerous already, and such a rule could serve only to place a greater load on an already over-burdened Court. Since the rule of finality as illustrated by the Clark case *is flexible enough to allow review when hardship would otherwise result, there seems no immediate necessity for change.*"

48 Harvard Law Review (1934-35), 302, 303-4, 308-9.

We submit that the judgment here appealed from is final within both the letter and spirit of the rule which this Court has always observed for testing the finality of a judgment of a state court, and that this Court should consider the important constitutional question presented by this appeal and decide the same upon its merits.

Statement of the Case.

As heretofore indicated in the discussion of the jurisdiction, the action was one to recover a tax levied by the appellee under the California Sales Tax Act upon the sale of fuel oil to the New Zealand Government Stores Control Board (heretofore and hereafter referred to as the "Control Board"). As stated, all the material facts are set out in the formal averments of the complaint [R. 1-9] and in the claim for refund attached to the complaint as Exhibit "B" [R. 11-15], and they are admitted by the answer [R. 16-17].

The case was submitted upon the pleadings and two stipulations of fact, appellee offering no evidence [R. 47]. The stipulations are found in the record, pages 18-30 and 31-32. Although unnecessary, because no issue of fact was presented by the pleading or proof, formal findings of fact and conclusions of law were made by the court [R. 48-65], the first finding being that all the allegations of the complaint were true [R. 48]. As there was no challenge of the accuracy of that finding by any of the majority or dissenting opinions of the Supreme Court of California, we will take the facts from the complaint except as otherwise indicated. Concisely, they are:

Appellant is the successor in interest of William C. McDuffie, as trustee of the Richfield Oil Company of California, having assumed all the obligations and liabilities of said trustee [Compl. III, R. 1-2]. In December 1936, the Control Board issued in New Zealand a written invitation for bids on one cargo of fuel oil for the New Zealand Division of the Royal Navy, specifying that delivery of the fuel oil should be "f.o.b. New Zealand Government tank steamer at any port beyond New Zea-

land specified by the tenderer," [Compl. VI, R. 4; Finding II, R. 48]. The bid of William C. McDuffie as trustee was accepted by the Control Board [Compl. VI, R. 5]. Thereafter, it was agreed that the Control Board could elect to purchase two cargoes instead of one if it so desired [Stip. R. 18-19], and under date of February 4, 1937, a written contract for the sale of two cargoes of fuel oil was entered into in New Zealand providing for delivery of each of said cargoes to be made into New Zealand Tank Steamer R.F.A. "Nucula" at Los Angeles, California, and that bills of lading and other customary shipping documents were to be handed to the Master of the "Nucula", and that the fuel oil was to be consigned to the Naval Officer in Charge at New Zealand [Compl. VI, R. 5; Stip. R. 18, 22-23]. While the two cargoes were handled in the same way, a tax was levied only upon the second cargo delivered to the "Nucula" [Stip. R. 19] and, therefore, the complaint and this statement are confined to that cargo.

Pursuant to the said written contract, the appellant, as successor in interest to said McDuffie, delivered to the New Zealand naval tank steamer R.F.A. "Nucula" 43,757 barrels of fuel oil in bulk [Compl. VI, R. 6], and at the same time the Master of the R.F.A. "Nucula" executed a bill of lading designating appellant as shipper and consigning the oil to the Naval Officer in Charge at Auckland, New Zealand [Compl. VI, R. 6]. A copy of the bill of lading, in the usual form of such documents, consigning the oil to said Naval Officer is found in the record, pages 27-30.

In connection with said delivery, appellant executed and filed in the office of the United States Collector of Cus-

toms at the Port of Los Angeles a Shipper's Export Declaration [Compl. VI, R. 6], which is found in the record at page 26a, and in connection with the delivery of said oil, appellant delivered to the Master of the R.F.A. "Nucula" the customary shipping documents consisting of copies of the run ticket, the inspector's certificate and the bill of lading [Compl. VI, R. 6].

Appellant was paid the purchase price therefor by the said Control Board [Compl. VI, R. 6], payment being made in London, England, to the duly authorized agent of appellant [Stip. R. 18]. Appellant has not collected or attempted to collect from the purchaser any sales tax [Compl. VI, R. 6-7]. The entire amount of the oil delivered was transported by the "Nucula" and delivered to the New Zealand Division of the Royal Navy at Auckland. No portion was delivered or unloaded at ports of the United States or used or consumed within the State of California or during the transportation [Compl. VI, R. 7].

The oil sold to the Control Board and delivered to the "Nucula" was manufactured by the appellant at the Richfield Refinery at Watson, California [Compl. VI, R. 7]. This refinery is located about midway between the City of Los Angeles and the Marine Terminal at Long Beach [Stip. R. 31], and at all times appellant and its predecessor in interest maintained storage tanks at the Marine Terminal connected with its refinery tanks at Watson by a pipeline [Stip. R. 31].

When appellant was advised that the "Nucula" was between 24 and 48 hours from the Marine Terminal, it started pumping oil from its refinery at Watson to the storage tanks at the Marine Terminal and continued until the tanks were full [Stip. R. 31-32].

At the time of trial, there were no records available as to whether the "Nucula" was ready to receive the oil before the entire cargo was pumped into the storage tanks, but the oil was not held in the tanks at the Marine Terminal more than 24 to 36 hours, and as soon as the "Nucula" had docked and was ready to receive the oil, appellant started pumping it from the storage tanks into the "Nucula" and continued steadily and without interruption until the entire cargo was delivered into the "Nucula" [Stip. R. 32].

The complaint alleged and the court found that it was the intention of the parties at all times that the oil should be exported from California to New Zealand and that the various facts detailed above were steps in a single transaction constituting an exportation of the said oil [Compl. VII, R. 7, 8, Findings 1, 12, 13, R. 48, 63, 64].

The appellee levied a three per cent tax upon the total sums paid for said fuel oil, which was paid under protest and a claim for refund made [Compl. V, R. 2-3; 11-15].

As stated, all of the above facts were either admitted in the answer or stipulated to, and are accepted as correct in both the first and last majority and minority opinions of the California Supreme Court.

Specifications of the Assigned Errors Intended to Be Urged by Appellant.

The appellant intends to urge each of its fourteen assigned errors found in the Transcript [R. 100-103] as follows:

(1) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in sustaining the validity of the California Retail Sales Tax Act of 1933, as amended, construed, applied and enforced to impose a tax upon the sale of fuel oil here involved, as against appellant's contention that said Act, so construed, applied and enforced, is invalid under Article I, Section 10, Clause 2, of the United States Constitution.

(2) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the California Retail Sales Tax Act of 1933, as amended, when construed and applied to impose a tax of 3% upon the sale of fuel oil to the New Zealand Government Stores Control Board for exportation to New Zealand, and which was so exported, is not invalid under and repugnant to the provisions of Article I, Section 10, Clause 2, of the United States Constitution.

(3) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the tax levied upon and collected from appellant, Richfield Oil Corporation, pursuant to the California Retail Sales Tax Act of 1933, as amended, was not an impost or duty on exports in violation of or repugnant to or within the meaning of Article I, Section 10, Clause 2, of the United States Constitution.

(4) The Supreme Court of the State of California erred in its final judgment in the above entitled cause

in its determination that any event that, under Article I, Section 10, Clause 2 of the Constitution of the United States, may be taxed under the California Retail Sales Tax Act of 1933, as amended, occurred prior to the commencement of the exportation of the oil to New Zealand.

(5) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the delivery of the oil and the passage of title to the said oil occurred prior to the commencement of the exportation of said oil.

(6) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that no exportation of the oil commenced until the vessel "Nucula" started to New Zealand.

(7) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the transportation of the oil from appellant's refinery to its Marine Terminal, and the delivery of the oil from the storage tanks at the Marine Terminal to the vessel "Nucula" were not movements of the oil in exportation to New Zealand.

(8) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in failing to give consideration or effect to:

(a) The New Zealand Government Stores Control Board's invitation for tenders which stated that the oil was "required by the New Zealand Division of the Royal Navy * * * for delivery f.o.b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer."

(b) The provisions of the sales contract which, among other things, required the delivery to the Master of the vessel "Nucula" of bills of lading and other customary shipping documents consigning the oil to the Naval Officer-in-Charge, Auckland, New Zealand.

(c) The execution of the bill of lading consigning the oil to the Naval Officer-in-Charge at Auckland, New Zealand.

(d) The execution and filing of the export declaration.

(e) The actual exportation of the oil to New Zealand pursuant to the contract, bill of lading, and export declaration.

(9) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the sale of oil was an intrastate sale instead of an export sale.

(10) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the power of the State to tax exports is co-extensive with and subject to the same limitations as its power to tax interstate commerce sales or transactions.

(11) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the tax levied upon appellant was

not invalid, illegal or unenforceable and was not contrary to, or in violation of, the provisions of Article I, Section 10, Clause 2, of the Constitution of the United States, because the said tax was non-discriminatory.

(12) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the provisions of the California Retail Sales Tax Act of 1933, as amended, construed and applied to impose a tax measured by the gross proceeds of the export sale of the oil here involved, could be sustained as an excise or privilege tax on the privilege of performing in California acts which were part of, or steps in, the exportation of said oil.

(13) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the scope and effect of United States Constitution, Article I, Section 10, Clause 2 permits or requires different results as to the validity of a tax upon exports when (1) the goods are delivered for exportation to the purchaser's vessel, and (2) when the goods are delivered for exportation to a common carrier.

(14) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in reversing the judgment of the Superior Court of the State of California.

SUMMARY OF ARGUMENT.

I.

The Court Below Erred in Deciding That No Exportation of the Oil Had Commenced Until After the "Nucula" Had Started From the Marine Terminal to New Zealand. [Point I, pp. 34 to 55; Assignments of Error 1-9, 13 and 14; R. 100-103.]

(1) The decision of the court below that exportation does not start until the goods have been loaded into a vessel and the vessel has started for a foreign port is illogical, and would practically nullify the provisions of Article I, Section 10, Clause 2 of the Constitution, and would do away with none of the evils which it was the object of the Constitution to suppress [p. 34].

(2) The exception permitting the states to levy imposts necessary for the execution of inspection laws demonstrates that it could not have been the intention of the framers of the Constitution that exportation did not start until afer the vessel cleared for a foreign port. [pp. 34 to 36].

(3) The constitutional prohibition against a tax on exports extends to any tax which burdens any phase, incident, or process of exportation. Delivery of the goods to be exported to the vessel that is to carry them to a foreign country is an essential step in the process of exportation [pp. 36 to 37].

(4) To convey the oil from California to New Zealand it was necessary (1) for appellant to pump it into

the tanks of the "Nucula", and (2) for the "Nucula" to convey it from Long Beach to Auckland. Each movement of the oil was as essential to its reaching Auckland as the other. The act of delivering the oil to the "Nucula" was as much a step in and a necessary part of its exportation as its later transportation [pp 38; 49 to 51].

(5) Transportation by water is impossible unless the thing transported is put aboard a ship and the loading of goods upon a vessel is as much a part of the exportation as the movement of the goods by the vessel [p. 38].

(6) The fact which the majority of the court below seemed to think was determinative of the case,—that title passed to the purchaser in California on delivery of the oil to its vessel in California waters,—is quite unimportant. Delivery to a common carrier also would have passed title to the purchaser as effectively as did delivery to the "Nucula" [p. 39].

(7) For the purpose of determining whether articles are imported or exported, the place where title vests is not material, and the determination of the question is governed by matters of substance and not form or the technical procedure with which the transaction is clothed [pp. 40-41].

(8) While the delivery of oil to the "Nucula" passed title to the New Zealand Government, it also irrevocably committed the oil to exportation [p. 41].

(9) The case factually cannot be distinguished from, and is governed by, the decision of this Court in *Spalding & Brothers v. Edwards*, 262 U. S. 66, which is directly contrary to the majority opinion of the court below, and which necessitates reversal of the judgment appealed from [pp. 41 to 46].

(10) Under the California Retail Sales Tax Act no taxable incident occurred until the oil passed the vessel's rail. At that time it was, and since leaving appellant's tanks had been, moving in exportation towards New Zealand [pp. 49 to 51].

(11) The oil was moving in exportation when appellant started pumping it from its tank farm to the storage tanks at the Marine Terminal, and certainly from the storage tanks at the Marine Terminal into the "Nucula" [p. 51].

(12) This Court has held in a long and unbroken line of decisions that exportation starts with the first movement of the goods towards the sea [pp. 51 to 54].

(13) The parties to the sale had no other object than the exportation of oil from California to New Zealand [p. 55].

(14) The delivery of the oil to the "Nucula" cannot be carved out as an independent taxable incident apart from the entire transaction [pp. 54 to 55].

II.

The Court Below Erred in Determining That the Power of the State to Tax Exports Was Co-extensive With Its Power to Tax Interstate Commerce, and That as the Tax Was Nondiscriminatory, It Did Not Violate Article I, Section 10, Clause 2 of the Constitution. [Point II, pp. 56 to 65; Assignments of Error 1, 2, 10, 11, and 14; R. 100, 102-103.]

(1) Except for the decisions of *Department of the Treasury v. Wood Preserving Corporation*, 313 U. S. 62, and *Wisconsin v. J. C. Penney Company*, 311 U. S. 435, all of the cases cited by the majority opinion of the court below sustain the state taxes as there involved, as within the limited power of the states to tax interstate commerce. *Wisconsin v. J. C. Penney Company* is not in point as it does not deal with taxation of interstate or foreign commerce but with the due process clause of the Federal Constitution. The decision of this Court in *International Harvester Company v. Department of Treasury of Indiana*, 322 U. S. 340, 346, shows that the real basis of the decision in *Department of the Treasury v. Wood Preserving Corporation* was that the tax involved in that case was actually sustained upon the ground that it was one within the limited taxing power of the states upon interstate commerce [pp. 56 to 59].

(2) In its decision, the court below entirely overlooked the fact that the Constitution contains no prohibition against taxation of interstate commerce, and hence the states may levy taxes upon such commerce which are not (1) discriminatory, or (2) so burdensome as to in-

terfere with the control of that commerce by Congress. On the other hand, the prohibition against state taxation of exports or imports is absolute and unqualified [pp. 60 to 63].

(3) To sustain the decision of the court below, Clause 2 of Section 10 of Article I of the Constitution must by interpretation be amended so as to read:

"No State shall, without the consent of the Congress, lay any *discriminatory* Imposts or Duties on Imports or Exports" [p. 63].

(a) A single exception being made as to inspection laws clearly shows that the framers of the Constitution did not intend any other exceptions from the absolute prohibition against state taxation of exports [p. 64].

(b) Reading into the clause the word "discriminatory" would grant specific authority to the several States (1) to levy nondiscriminatory imposts upon imports; (2) to levy discriminatory imposts upon both exports and imports for the purpose of executing their inspection laws [pp. 63 to 64].

(c) The objects to be accomplished and the history of Article I, Section 10, Clause 2 show conclusively that the prohibition was intended to be absolute and the states surrendered "altogether" their right to tax imports or exports [pp. 64 to 65].

(4) The fact that the statute is nondiscriminatory is immaterial since the protection afforded exports by Article I, Section 10, Clause 2 is not so restricted [pp. 62 to 63].

(5) The court below was in error in assuming that the framers of the Constitution did not intend to discriminate in favor of exports or imports against domestic transactions since no limitation was placed upon the power of th. ..ates to tax local transactions, whereas state taxation of imports and exports was entirely prohibited [p. 59].

III.

The Court Below Erred in Determining That the Tax Could Be Sustained as an Excise Tax for the Privilege of Conducting a Retail Business in California. [Point III, pp. 66 to 71; Assignments of Error 1, 2, 12 and 14; R. 100, 103.]

(1) While the State of California had a right to impose any tax which it saw fit upon any individual or corporation for the privilege of conducting a retail business within the state, it could not tax the privilege of conducting an export business or exporting goods from the state or making export sales therein [pp. 66 to 67].

(2) The fact that the tax sought to be recovered in this suit was included in the same assessment with other sales taxes properly levied upon intrastate sales by appellant does not validate the tax upon the export sale [p. 71].

ARGUMENT.

That the oil was actually exported from California to New Zealand in conformity with a contract for such exportation is not, and cannot be challenged. Article I, Section 10, Clause 2 of the United States Constitution reads:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's Inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The final majority opinion of the court below is to the effect that, construing the Sales Tax Act as permitting a tax upon this export sale does not render the statute repugnant to the Constitution. This remarkable conclusion is placed upon three grounds:

1. That, as title passed upon delivery of the oil to the purchaser's vessel, the sale was completed within California, and exportation did not commence until the "Nucula" started to New Zealand.

2. That in effect, the power of the States to tax exports is coextensive with their power to tax interstate commerce transactions, and hence a sales tax on exports is valid if the same tax is laid on a local

sale, notwithstanding the constitutional prohibition against any tax by a state upon exports.

3. That the tax can be sustained as a license tax for the privilege of doing business within the State of California.

The correctness of each of the above grounds is challenged by the appellant's Assignments of Error, the first by Assignments 1 to 9, 13 and 14, [R. 100-103]; the second by 1, 2, 10, 11 and 14, [R. 100-103]; the third by Assignments 1, 2, 12 and 14, [R. 100-103]. We will discuss separately the error of each of the three grounds.

For brevity, we shall refer to the acts of appellant's trustee predecessor in interest as the acts of Richfield or of the appellant.

As heretofore stated, all emphasis throughout the Argument will be ours unless otherwise noted.

I.

The Supreme Court of California Erred in Its Decision That No Exportation of the Oil Commenced Until After the "Nucula" Had Started From the Marine Terminal to New Zealand.

In the final majority opinion of the court below, it is said:

> "But here the delivery of the oil which resulted in the passage of title, and the completion of the sale, and the taxable incident, *occurred prior to the commencement of the exportation.* The delivery of the oil was to the buyer's vessel not a common carrier. The vessel was in California waters and was not bound for any destination *until it started to move from the port. It became the property of the buyer before any movement in the channels of commerce occurred.*"
>
> 163 P. (2d) 2, 3. [R. 88.]

We submit that the slightest reflection will show the error and illogic of this view. If all that was intended by the Constitution was to prohibit taxation of exports after they had been loaded on to a vessel, the prohibition is meaningless and of no practical value. None of the evils which it was the express object of the framers of the Constitution to do away with would have been ended. The seaboard states could have continued to tax the goods sent from other states to be loaded upon ships for transportation to foreign countries. See:

Cook v. Pennsylvania, 97 U. S. 566, 574.

In *Blount v. Munroe*, 60 Ga. 61, 65, 66, the Supreme Court of Georgia, answering a similar contention, said:

> "It cannot be the meaning of the clause of the constitution that it becomes an export when on ship-

board, *and not before;* for the exception in respect to the inspection laws shows that such is not the meaning—those laws being almost always, if not always, without exception, executed on land before shipment."

See *Clarke & Co. v. Clarke* (C. C. Ga.), 3 Woods, 408, 410-11, Federal Cases No. 2846, p. 943 at pp. 944-5, where the Federal Court reached exactly the same conclusion as to a similar situation of a different exporter. There, the court said in part:

"The logs on which the tax was levied were the property of, and were in possession of persons engaged exclusively in exporting timber to foreign countries, they were purchased from citizens of Georgia for the purpose of exportation, they were in a port of the United States awaiting shipment, they had been inspected according to the laws of the state, and the purpose of the owners to export the logs was, after the levy of the tax thereon, actually carried out and the logs were exported.

"It is clear, and it seems to be conceded by defendants, that if the logs had actually been on shipboard when the tax was levied, they might have well been considered exports. *Is the fact that they were still on land, though awaiting shipment, such a circumstance as deprives them of their character as exports?* The reasoning of the court in the case of *Brown v. Maryland*, 12 Wheaton 419, *demonstrates that it is not.*"

After discussing the exception in the clause as to enforcement of inspection laws and giving the exception the same effect as was accorded it by the Georgia Supreme

Court; and after quoting from Mr. Madison's discussion of Clause 2 of Section 10 of Article I at the Virginia Convention which ratified the Constitution, the court continued:

> "But the defendants claim that the tax upon the logs was a tax levied upon the general mass of property in the state, and does not therefore fall within the constitutional prohibition, being neither an 'impost' nor a 'duty.'
>
> "This construction would defeat the purpose of which section 10, article 1, was adopted. *It would put it in the power of the state, by changing the manner of levying the tax, and by giving it another name, to evade the prohibition of the constitution.*"
>
> *Clarke & Co. v. Clarke*, (C. C. Ga.), 3 Woods 408, 411; Federal Cases No. 2846, p. 943 at pp. 944-5.

The above are very early cases, but they have never been questioned and, further, there is no answer to that portion of the decisions pointing out that the exception to the total prohibition against the state tax on exports, "as may be absolutely necessary for executing it's Inspection Laws," shows conclusively that the prohibition was not intended to be limited to a tax upon goods after they have been loaded into the vessel, since such inspections are almost invariably made before the goods are placed aboard the ship.

There is not a single decision of this Court which has considered Article I, Section 10, Clause 2 of the Constitution which has limited or circumscribed it as did the majority opinion of the court below. On the contrary, all of the decisions of this Court which have considered the constitutional prohibition have given it a wide and liberal interpretation in order to effectuate the obvious intention

of the framers of the Constitution that exports should be free from state taxation. To that end, it has been held that the every phase and incident of an export such as bills of lading, charter parties and marine insurance are exempt from state taxation. See:

United States v. Hvoslef, 237 U. S. 1, 13;

Fairbanks v. United States, 181 U. S. 283, 292-3;

Thames & Mersey Insurance Company v. United States, 237 U. S. 19;

N. Y. and Cuba Mail S. S. Co. v. United States, (D. C., N. Y.), 125 Fed. 320.

The observation of Chief Justice Hughes, speaking for this Court in *Willcuts v. Bunn*, 282 U. S. 216, 228, in interpreting the first three of the above decisions, though dictum, is most pertinent:

> "Similarly, with respect to federal taxation of articles exported from any State, the constitutional inhibition gives immunity *to the process of exportation and to the transactions and documents* embraced in that process. Fairbank v. United States, 181 U. S. 283; United States v. Hvoslef, 237 U. S. 1; Thames & Mersey Marine Insurance Company v. United States, 237 U. S. 19. *Only on that construction can the constitutional safeguard be maintained.*"
>
> *Willcuts v. Bunn*, 282 U. S. 216, 228.

Clearly, the delivery of the oil to the "Nucula" was a phase of, and a necessary incident in,—indeed, an essential part of the process of; the exportation of the oil. It was purchased solely for the use of the New Zealand Division of the Royal Navy at Auckland. In order to get it there, it was as essential and as necessary to move the oil from

the appellant's tank farm into the "Nucula" as it was for that vessel to carry it to Auckland.

The decision of this Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 92, 94, seems to us conclusive on this point and necessitates a reversal of the judgment appealed from. There, the appellant was engaged in several activities, among them loading and unloading ships. The excise tax of the State of Washington required payment of a percentage of gross income for the privilege of doing business in that state. Suit was instituted by the appellant to enjoin the Tax Commission from enforcing the tax on the ground that appellant's work in loading and unloading vessels was interstate and foreign commerce. The suit was dismissed by the trial court and the judgment affirmed by the Supreme Court of Washington. In reversing the latter judgment this Court, speaking through Justice Cardozo, said, in part:

> "Transportation of a cargo by water is impossible or futile *unless the thing to be transported is put aboard the ship* and taken off at destination. A stevedore who in person or by servants does work so indispensable *is as much an agency of commerce as shipowner or master.*
>
> * * * * * * * *
>
> "The business of loading and unloading *being interstate or foreign commerce*, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts."
>
> *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 92, 94.

As we shall hereafter show [pp. 51 to 54], this Court has held in a long and unbroken line of decisions

that exportation commences with the first movement of the goods towards the sea. Clearly, the pumping of the oil from appellant's tanks into the "Nucula" was such a movement.

The majority of the court below in its final decision apparently gave controlling effect to the fact that the delivery of the oil was to the purchaser's vessel, passed title to the purchaser within the State of California. The majority opinion indicates a different result might have been accomplished if the oil had been delivered to a common carrier. But, under the law of California, in the absence of an agreement to the contrary, the delivery of the oil to a common carrier would have equally passed title to the purchaser. See:

Boston etc. Company v. Rosenthal, 68 Cal. App. (2d) 564, 568, 156 P. (2d) 963, 965;

Martyn v. Western Pacific Railway, 21 Cal. App. 589, 595, 132 Pac. 602, 604.

This is the rule in most, if not all, jurisdictions. See:

Spalding & Brothers v. Edwards, 262 U. S. 66, 68, 69;

Nelson Bros. Coal Co. v. Berryman (C. C. A. 2), 48 F. (2d) 99, 100;

In re Globe Varnish Company (C. C. A. 7), 114 F. (2d) 916, 918.

But, the Constitution of the United States does not make the prohibition against a state tax on exports dependent upon whether the title remains in the exporter or vests in the purchaser within or without the United States, or dependent upon whether the article is exported in the seller's vessel, the buyer's vessel, or a common carrier.

The views of the majority of the court below are directly contrary to the recent decision of this Court in *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 662, 663. That case involved the right of the State of Ohio to levy taxes upon fibers which had been imported by the petitioner and stored by it in its warehouse for use in manufacture of its goods. The *ad valorem* tax which the State of Ohio had imposed was sought to be sustained upon two distinct grounds: (1) that as the goods had been imported in the name of a broker, and title passed to the petitioner in this country, there had been a technical sale by the importer; (2) that through the storage by petitioner of the goods they had lost their character as imports. While this Court was divided as to the second ground, we find no dissent from the majority decision on the first ground, wherein it is said:

> "For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether the title to the merchandise imported vested in him who caused it to be brought to this country at the time of shipment or only after its arrival here . . . For in determining the meaning and application of the constitutional provision, we are concerned with matters of substance not of form. When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected."
>
> *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 662, 663.

See, also, to the same effect:

Carson Petroleum Co. v. Vial, 279 U. S. 95, 103;
In re Globe Varnish Company (C. C. A. 7), *supra*, 114 F. (2d) 916.

In the instant case the oil was delivered to the "Nucula" under a written contract providing for its exportation by that vessel to New Zealand, so that no other lawful disposition could have been made of it and, as pointed out in *Spalding & Brothers v. Edwards*, 262 U. S. 66, 67, the very act which vested title in the purchaser *irrevocably committed the oil to exportation*. Indeed, we submit that the instant case cannot be distinguished from the *Spalding & Brothers v. Edwards* case. That action was instituted by the plaintiff to recover from the Collector of Internal Revenue taxes which had been levied under color of the War Revenue Act of October 3, 1917, and paid under protest. The applicable section of the statute is not fully stated in the opinion, but reads:

> "That there shall be levied, assessed, collected and paid—(f) upon all tennis rackets, golf clubs, baseball bats, lacrosse sticks, balls of all kinds, including baseballs, foot balls, * * * sold by the manufacturer, producer, or importer, a tax equivalent to three percentum of the price for which so sold; and * * *." 40 U. S. Stats. at Large, 300, 316.

Delgado & Compania, a commercial firm in the City of La Guaira, Venezuela, ordered Scholtz & Company, commission merchants in New York, to buy for their account and risk a certain number of baseballs and baseball bats at a stipulated price. Scholtz & Company then purchased the required merchandise from the plaintiff, delivering to it a written export order directing the packing

and marking of the goods, and that they be sent to the Atlantic and Caribbean Steam Navigation Company, an exporting carrier in New York. The plaintiff marked and delivered the goods as directed and was given a receipt by the carrier which it sent to Scholtz & Company, and which was exchanged by them for an export bill of lading in their own name. Scholtz & Company paid the plaintiff the agreed price and was later paid its commission by its principals.

The District Court and the Circuit Court of Appeals upheld the tax, but their judgments were reversed by this Court which, speaking through Justice Holmes, said, in part:

> "* * * The question is whether the sale was a step in exportation, assuming as appears to be the fact, that the title passed at the moment when the goods were delivered into the carrier's hands.
>
> "The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was 'laid on articles exported from any State', because that is forbidden in terms by the Constitution (citing numerous cases). * * * Articles in course of transportation cannot be taxed (citing case). * * * So we return to the question that we have stated. To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary. In this case, for instance, while the goods were in process of manufacture they were none the less subject to taxation if

they were intended for export and made with specific reference to foreign wants. Cornell v. Coyne, 192 U. S. 418. Heisler v. Thomas Colliery Co., 260 U. S. 245. On the other hand no one would doubt that they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun.

"*The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods.* The expected and accomplished effect of the act was to start them for that port."

Spalding & Brothers v. Edwards, 262 U. S. 66, 68-9.

So, in the instant case, the delivery of the oil into the tanks of the "Nucula" which passed title, irrevocably committed it to exportation. To say that the very act of placing it in the tanks of the "Nucula" can be taxed and the only immunity under the constitutional inhibition was against a tax upon the transportation of the oil by the "Nucula" is illogical and would defeat the very purpose of the constitutional provision.

Justice Holmes, after the portion of his decision quoted, continued:

"* * * The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result. Getting the bill of lading stands no differently from putting the goods on board ship. *Neither does it matter that the title was*

in Scholtz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co., was solely for the purpose of Delgado & Cia. and for their account and risk. *Theoretical possibilities may be left out of account."*

Spalding & Brothers v. Edwards, 262 U. S. 66, 69-70.

In the instant case, there were not even any theoretical possibilities. When the oil was pumped into the tanks of the "Nucula" it passed into the control of a foreign vessel and could not, without violating the contract and the bill of lading, and without compliance with the import laws, be returned to the plaintiff or to any other part of the United States. The delivery to a common carrier would not as completely have committed the oil to exportation, for the appellant would have had the right of stoppage in transit, which of course it lost by delivery to the "Nucula" over whose movements it had absolutely no control.

The Chief Justice of the State of California, speaking for the majority of the court below in its first decision, said, after discussing the decision of this Court in the *Spalding* case:

"Defendant seeks to distinguish the case, however, on the ground that while delivery therein was to a common carrier, delivery in the present case was to the purchaser's carrier. *The distinction is one of form rather than substance.* Delivery of goods to a common carrier for transportation is regarded as the beginning of the export journey because the destination of the goods is thereby fixed and certain. (Cit-

ing cases.) But delivery of the oil to the 'Nucula' in this case as effectively fixed its destination as did the delivery of the goods to the common carrier in the Spalding case. Here, as there, title passed upon delivery, and the passage of title enables the purchaser to change the destination of the goods and thereby evade the tax. But as stated in A. G. Spalding & Bros. v. Edwards, supra, 262 U. S. at page 70, 43 S. Ct. at page 486, 67 L. Ed. 865, 'There was not the slightest probability of any such change and it did not occur,' and 'theoretical possibilities may be left out of account.'

"The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. The means selected in this case in the light of all the circumstances, satisfies that inquiry.

* * * * * * * *

"The present case is even stronger than the Spalding case, for whereas here, the alleged local transaction was a direct sale to the foreign consumer and the oil was actually loaded aboard the carrier, the sale in the Spalding case was to an intermediary and the goods were merely delivered to the carrier."

155 P. (2d) 1, 4, [R. 75-6.]

The same thought was reiterated by the Chief Justice in his dissenting opinion to the final judgment of the court below, and was concurred in by Justice Edmonds [R. 94, 95; 163 P. (2d) 1, 6].

The trial court in its opinion on this subject said:

"Counsel for defendant here admits that in the circumstances of this case that plaintiff could actually export its product without ever coming within

the purview of this taxing statute. It could as consignor deliver to an exporting carrier oil consigned to New Zealand.' This is almost identically what it did.

* * * * * * * *

"Can we say here that if plaintiff had delivered the oil to some form of public carrier, consigned to the New Zealand government, the sale would not have been local nor the tax have applied, but when it does exactly the same thing except that instead of using a public carrier *it uses what should be a more dependable one in the shape of a naval vessel of the government which wanted the oil and sent the vessel here to take it to them, we should say that the sale was local and the tax collectible?*" [R. 37.]

In the final majority opinion of the court below it is said:

"If it had been delivered to a common carrier of export products a different result might be appropriate, for then it would have been placed in the hands of an instrumentality whose *sole purpose* is to export goods, thus indelibly characterizing the process as a part of exportation. Suppose a citizen of Mexico entered this country and purchased a banjo in a store a mile from the border with the unequivocal intent to take it back to Mexico with him and he did so. Would it be doubted that the retailer would be required to pay a tax on the sale? Would the result be any different if the Mexican came by his automobile and either he or the retailer for him placed the banjo in the car? Nor would the conclusion be altered if he gave the retailer an affidavit that he was taking the banjo to Mexico."

163 P. (2d) 3. [R. 88.]

The opinion ignores all essential features of the transaction,—features which it concedes "might" render the transaction one of export if the "Nucula" had been a "common" carrier. In the sale of the banjo nothing is done either by the buyer or the seller which would not be done in the case of *any local sale*. All earmarks of export are absent.

The use of an automobile is not significant, for the automobile may move north, south, east or west freely, without documentation, just as any other customer's car, or just as the purchaser who comes by foot. But the "Nucula" was an ocean-going vessel which could only move upon that channel of commerce and in such a manner as to take the oil without the State of California. Furthermore, any failure to take the oil from California would have been a violation of the contract and the bill of lading.

See:

Hughes Bros. Timber Co. v. Minnesota, 272 U. S. 469, 475, 476.

Unlike the banjo sale, the shipment, as contemplated, as documented, and as actually carried out, was a typical export sale.

The fact that the carrier vessel was owned by the purchaser does not prevent the shipment from being an export. The purpose of the constitutional provision was not to subsidize "common" carriers.

Again, the observation of the trial court on this subject is most appropriate and, we submit, unanswerable:

"The reason for the rule requiring delivery to a common carrier, where such a delivery is required,

is that in that way the shipment is irrevocably consigned to its foreign destination; that there must be no danger as there would be in the case of a private person, that the export might be defeated by some fraudulent arrangement between the shipper and the person.

"Here the oil was loaded upon a war vessel of a responsible foreign government, a vessel under the sole control of the power to which the oil was consigned. *The chance that the oil was not as certain of delivery to its consignee as if it were on a common carrier, is not even speculation.*" [R. 42.]

The trial court, in support of its conclusions, cited *Coe v. Errol*, 116 U. S. 517. The case is also cited in support of the respective conclusions of both the first and second majority opinions of the California Supreme Court, and in the dissenting opinion of the Chief Justice. It is not factually similar to the instant case, but it announces two rules of law, grounded in common sense, to which this Court has consistently adhered:

(1) That goods are not exempt from local taxation merely because they are intended for interstate sale or exportation.

(2) That such immunity attaches as soon as they commence an interstate journey or, in case of their exportation, upon their first movement towards the sea.

Applying these rules to the facts of the instant case, the trial court, the first majority opinion of the California Supreme Court and the dissenting opinion of the Chief Justice to the final majority opinion all concluded that the delivery of the oil to the "Nucula" was an act in its

exportation. The final majority opinion concluded that no exportation movement had occurred prior to the vesting of title in the purchaser, and exportation did not occur until the "Nucula" cleared from the Marine Terminal and started towards Auckland.

We submit that the final opinion is erroneous, and entirely disregards the rule of *Coe v. Errol, supra.* See:

Carson Petroleum Co. v. Vial, supra, 279 U. S. 95, 101.

While the oil was held in the appellant's tank farm at Watson mingled with other oils it was, of course, a part of the mass of property in the state and subject to all state *ad valorem* taxation. But, when the "Nucula" wirelessed her approach, and the appellant started pumping the oil from the tank farm to the storage tanks at the Marine Terminal, its exportation had certainly commenced. Such movement of the oil was not merely a general preparation for a future export, but was itself required by the contract and was made in response to the notice of the vessel's approach [R. 22-3].

It is true that the oil was held for a short space of time in the storage tanks at the Marine Terminal but that did not constitute a breaking of the movement which was resumed as soon as the "Nucula" was ready to receive the oil.

> "There has been a liberal construction of what is continuity of the journey, in cases where the Court finds from the circumstances *that export trade has been actually intended and carried through.*".
>
> *Carson Petroleum Company v. Vial, supra,* 279 U. S. 95, 105-6.

See, also:

Railroad Commission v. Worthington, 225 U. S. 101, 108-11;

Western Oil Refining Company v. Lipscomb, 244 U. S. 346, 349-50.

In the last case cited the State of Tennessee sought to impose a privilege tax upon goods shipped into Tennessee from Indiana, the goods being shipped in cars to the plaintiff at Columbia, Tennessee, where a portion were delivered, and the remainder rebilled to the plaintiff at Mount Pleasant, Tennessee. The Supreme Court of the State held that no tax could be levied upon the goods delivered at Columbia, but that the rebilling of the goods to Mount Pleasant constituted intra-state commerce. In reversing this decision, this Court said, in part:

> "Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. *As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive.*" (Citing a great number of cases.)
>
> "Here, when the cars were started from Illinois and Indiana, it was intended by the shipper, as is expressly conceded, that they should be taken to Columbia, Tennessee, where a portion—a definite portion—of the contents of each was to be taken out and delivered, and that the cars, with the re-

mainder of the contents, should proceed to Mount Pleasant in the same State; *and this is what actually was done.*"

Western Oil Refining Company v. Lipscomb, 244 U. S. 346, 349.

Here, when the oil was started from the tank farm it was intended that it should be placed aboard the "Nucula" for transportation to New Zealand, *and that, in fact, was actually done.*

Clear as it seems to us that the exportation of the oil had commenced when the appellant started pumping it from appellant's tank farm, it is not necessary even to maintain that proposition. Until the oil passed over the vessel's rail, there had been neither delivery of it nor transfer of title, and hence no taxable incident as defined in the Sales Tax Act had occurred. Certainly, when the appellant started pumping oil from its storage tanks at the Marine Terminal towards the vessel's rail its exportation was under way. When, therefore, the oil reached the vessel's rail, it was moving and had been moving from the time it left the tanks in exportation towards New Zealand.

In conformity with the rule of *Coe v. Errol, supra*, this Court has held in an unbroken line of decisions that are unnoticed in the majority opinion (since they cannnot be reconciled with its conclusions), that exportation starts with the first movement of the goods towards the sea.

In *Texas & New Orleans Railroad Company v. Sabine Tram Company*, 227 U. S. 111, defendant in error brought action in the courts of Texas against the railroad company for a refund on freight.

The Tram Company was engaged at Ruliff, Texas, in the manufacture of lumber. The Powell Company was engaged in buying lumber for export to Europe. It purchased the lumber f.o.b. cars at Sabine, and the Tram Company delivered the lumber to the cars of the Texarkana and Fort Smith Railway Company at Ruliff to be transported to Beaumont, its terminus, and hence by the Texas and New Orleans Railway to tidewater at Orange. At the time of purchase and delivery at tidewater, the purchaser, Powell Company, did not know what particular lumber would be shipped to any one port or consigned to any one vessel, the loads being determined by their sales and the arrival of vessels.

The railway charged a rate of 15 cents per hundred pounds permitted by the rates of Interstate Commerce Commission for interstate and export freight. The rate of the Railroad Commission of the State of Texas for intrastate freight was 10 cents per hundred pounds.

The contract of purchase was made, the price paid, the vesting of title to the lumber in Powell Company and the transportation of the lumber, all occurred wholly within the State of Texas. The Sabine Tram Company had no knowledge that the lumber was purchased for export except that at Orange there was no community whose economic needs would require any such amount of lumber. The state courts held the transaction to be intrastate, and hence the Tram Company was entitled to recover the penalties provided by the state law for overcharge. The judgment of the state court was reversed. This Court, speaking through Justice McKenna, said, in part:

> "The determining circumstance is that the shipment of the lumber to Sabine was but a step in its

transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. *Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a State. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading the commerce will be given local character, though it be essentially foreign.*

"That it is the nature of the traffic and not its accidents which determines its character is illustrated by Ohio Railroad Commission v. Worthington, supra."

Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 126.

See, also, to the same effect:

Railroad Commission of Louisiana v. Texas etc. Co., 229 U. S. 336, 341;

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 526-7;

Hughes Bros. Timber Company v. Minnesota, supra, 272 U. S. 469, 475, 476;

Spalding & Brothers v. Edwards, supra, 262 U. S. 66, 68, 69;

Carson Petroleum Co. v. Vial, supra, 279 U. S. 336-7;

Blount, Sheriff, et al. v. Munroe, supra, 60 Ga. 61, 65-6;

Clarke & Co. v. Clarke, supra, 3 Wood's 408, 410. Federal Cases No. 2846, pp. 943-944-5.

In the first case cited, it is said:

"The principle enunciated in the cases was that *it is the essential character of the commerce, not the accident of local or through bills of lading,* which determines Federal or state control over it. *And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another State or to a foreign country.*"

Railroad Commission of Louisiana v. Texas & Pacific Railway Company, 229 U. S. 336, 341.

The decision of the majority of the court below that the passing of title to the oil constituted a taxable incident separate and independent from its exportation is, without any logical basis and, as we have repeatedly pointed out is a denial of the realities of the case. While dealing with an interstate commerce case, the observations of this Court in the very recent case of *Nippert v. City of Richmond* (not yet officially reported), 90 L. Ed. 496, 500, are most pertinent:

"Appellee's rationalization takes only partial account of the reasoning and policy underlying the Berwind-White decision and its differentiation of the drummer authorities. If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation *and without regard to the substantial economic*

effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. *All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact.* And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result."

Nippert v. Richmond (not yet officially reported), 90 L. Ed. 496, 500.

In the instant case, we submit that there is no basis for even the most hypertechnical contention that a taxable incident had occurred or could be carved out of the transaction prior to the exportation movement of the oil.

The parties to the transaction had no other object than the exportation of the oil from California to New Zealand. The contract, and the documents executed pursuant to the contract, required it, and the delivery of the oil by pumping it into the "Nucula's" tanks was no more an independent incident, separate from its exportation, than was the coming of the "Nucula" to the Marine Terminal and the return of the vessel with the oil to Auckland.

We submit that the first ground upon which the majority opinion of the Supreme Court of California based its final decision is wholly untenable, is both illogical and directly contrary to all of the applicable decisions of this Court, and if sustained, would defeat the manifest intent and purpose of the Constitution.

II.

The Supreme Court of the State of California Erred in Its Determination That the Power of the State to Tax Exports Is Coextensive With Its Power to Tax Interstate Commerce and That Because the Tax Here Levied Was Nondiscriminatory It Did Not Violate the Unqualified Constitutional Prohibition Against Taxation of Imports or Exports.

It is to be noted that the final opinion of the majority of the court below does not cite in support of its conclusions a single decision dealing with exports or imports or with the construction of Article I, Section 10, Clause 2 of the Federal Constitution. The reason is that *none can be found which sustains its decision.* Indeed, we submit that a reading of the majority opinion of the court below will demonstrate that the majority of the court below found it necessary to disregard all of the decisions of this Court in export-import cases.

The majority opinion, however, does cite and comment on a number of decisions of this Court upholding state taxes upon interstate commerce transactions. We think there is no need to review the many cases cited for, with the exception of *Department of the Treasury v. Wood Preserving Corporation, supra,* 313 U. S. 62, and *Wisconsin v. J. C. Penney Company,* 311 U. S. 435, none of them sustains the tax upon the ground that the transaction was local or intrastate, but upon the ground that the several states may tax interstate commerce where the taxes are nondiscriminatory and not of such a nature as unduly to interfere with the control of such commerce by Congress. Indeed, that is the proposition

in support of which they are cited in the majority opinion of the court below. The basis upon which the rule rests is thus stated in the leading case of *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33, 46:

> "But it was not the purpose of the commerce clause *to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business.* Western Live Stock v. Bureau, 303 U. S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, *which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress.*"
>
> *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33, 46, 47.

Wisconsin v. J. C. Penney Company, supra, 311 U. S. 435, we do not believe is in point, as it deals neither with the question of taxation of interstate commerce nor of exports, but purely with the due process clause of the Constitution.

In *Department of the Treasury of Indiana v. Wood Preserving Corporation, supra*, 313 U. S. 62, the decision was apparently placed upon the fact that the sale, being completed within Indiana, was an intrastate sale. But we believe that the real basis of the decision was that upon which *McGoldrick v. Berwind-White Coal Mining Company* and other cases are placed. Indeed, in the

succeeding and very recent decision of *International Harvester Co. v. Department of Treasury of Indiana, supra*, 322 U. S. 340, 346, where the same statute was involved and this Court held the case indistinguishable from the *Wood Preserving* case, it is said:

> "Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (Nelson v. Sears Roe-Buck & Co., 312 U. S. 359, 363), we must acknowledge that the sales tax sustained in the Berwind-White case 'was, in form, imposed upon the gross receipts from an interstate sale.' Lockhard, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harv. L. Rev. 40, 87. But that case did no more than to hold that those in interstate trade could not complain if interstate commerce carried its share of the burdens of local government which helped sustain it. And there was no showing that more than that was being exacted.
>
> * * * * * * * *
>
> "We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way."
>
> *International Harvester Co. v. Department of Treasury of Indiana*, 322 U. S. 340, 346, 349.

See also:

> *Nippert v. City of Richmond, supra* (not yet officially reported), 90 L. Ed. 496, 500.

Although, as noted, none of these cases cited by the majority opinion of the court below in support of its con-

clusions deals with exports or imports or with Article I, Section 10, Clause 2 of the Constitution of the United States, it is in effect held by the majority of the court below that the interstate commerce tax cases cited by it overrule the decisions of this Court in the *Spalding* and other export cases and, in effect, nullify Article I, Section 10, Clause 2 of the Constitution. Thus, after discussing the above mentioned decisions of this Court, the majority opinion of the California Supreme Court concludes:

> "Under the foregoing authorities it is perfectly clear that had this been an interstate transaction it would have been subject to tax. It is inconceivable that the framers of the Constitution ever intended that the export-import clause should be used to discriminate against the states."
>
> 163 P. (2d) 4. [R. 91.]

In answer to a similar contention with reference to imports, this Court said:

> "It is said that our decision will result in discrimination against domestic and in favor of foreign producers of goods. *But such discriminations as there may be are implicit in the constitutional provision and in its purpose to protect imports from state taxation*"
>
> *Hooven & Allison Co. v. Evatt, supra,* 324 U. S. 652, 667-8.

See also:

United States v. County of Allegheny, 322 U. S. 174, 176.

It is obvious that the majority of the court below fell into grievous error in assuming that a state could levy the same tax upon an export sale that it could impose

upon an interstate sale; in other words, that the power of the state to tax imports and exports was coextensive with the power to tax interstate commerce.

In reaching this conclusion the majority of the court below overlooked entirely the great difference in the constitutional provisions as to taxation of imports and exports and interstate commerce. This difference doubtless resulted from the fact that the framers of the Constitution realized that trade between the states and trade between this nation and foreign countries presented entirely different economic and political problems. Imports and exports involve substantial economic and political questions affecting national policy not involved in interstate commerce. In any event, as this Court has many times pointed out, no prohibition was inserted in the Constitution against state taxation of interstate commerce, hence this Court has consistently held that the states are free to tax such commerce, except that they cannot levy taxes upon it which are either discriminatory or which unduly burden such commerce or interfere with the Congressional control thereof.

On the other hand, the Constitution unequivocally prohibits any state without consent of Congress from levying any taxes *of any character, nondiscriminatory or otherwise, upon exports or imports* "except what may be absolutely necessary for executing it's Inspection Laws."

This difference in the constitutional provisions as to the two classes of taxes has often been pointed out by this Court. See:

Woodruff v. Parham, 8 Wall. 123;
Sonneborn Bros. v. Keeling, 262 U. S. 506;
Fairbanks v. United States, 181 U. S. 283, 306.

In its latest consideration of this subject, this Court said:

> "We have often indicated the difference in this respect between the local taxation of imports in the original package *and the like taxation of goods, either before or after their shipment in interstate commerce.* In the one case the *immunity derives from the prohibition upon taxation of the imported merchandise itself.* In the other the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not."
>
> *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 665-666.

Many years ago the Supreme Court of California sustained an *ad valorem* tax upon imports in a warehouse upon the ground that as the tax was applicable to all property within the state, it was nondiscriminatory, and hence not within the constitutional prohibition. In reversing the judgment, this Court, speaking through Justice Field, said:

> "The question is not as to the extent of the tax, or its equality with respect to taxes on other property, *but as to the power of the State to levy any tax.*"
>
> *Low v. Austin*, 13 Wall. 29, 34.

In *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 521, in answer to the converse contention that the power of a state to tax interstate transactions was no

greater than its power to tax exports and imports, this Court said:

> "The earnestness with which the contention is pressed induces us, however, briefly to point out the misconception upon which it rests. It results from assuming that the rule which governs in a case *where there is an absolute prohibition is applicable where no such prohibition obtains.*"
>
> *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 521.

See also:

> *United States v. County of Allegheny, supra*, 322 U. S. 174, 176.

This distinction between the powers of a state as to the two classes of taxes also has been clearly recognized by State Courts as well. See:

> *State Board of Equalization v. Blind Bull Coal Co.* (Wyo)., 101 P. (2d) 70, 71, 73;
>
> *Standard Oil Co. v. Johnson*, 56 Cal. App. (2d) 411, 423, 132 P. (2d) 910, 917;
>
> *Washington Chocolate Co. v. King County* (Wash.), 152 P. (2d) 981, 990, 991.

It seems to us that the decision of this Court in *Murdock v. Pennsylvania*, 319 U. S. 105, 115, is conclusive that the majority of the court below erred in deciding that because the sales tax was nondiscriminatory the California statute was not repugnant to the Constitution if

construed and applied as imposing a tax upon an export sale.

> "The fact that the ordinance is 'nondiscriminatory' is immaterial. *The protection afforded by the First Amendment is not so restricted.*"
>
> *Murdock v. Pennsylvania,* 319 U. S. 105, 115.

There is even more reason to apply the above decision to the second clause of Article I, Section 10, than to the First Amendment to the Constitution.

The court below interpreted and enforced the Constitution as though Clause 2 of Article I, Section 10 read:

> "No State shall, without the Consent of Congress, lay any *discriminatory* Imposts or Duties on Imports or Exports * * *"

We submit that to affirm the decision of the court below it is necessary for this Court likewise by interpretation so to amend the Constitution.

It is obvious from both the language and the history of the Constitution that no such modification of the clear, unqualified prohibitions of Clause 2 was ever contemplated by the framers of the Constitution and would have been instantly rejected if suggested.

At the outset, it is to be noted that the prohibition is not on exports alone, but upon imports as well, and hence to read into the clause the word "discriminatory" would grant the specific right to the states to levy nondiscriminatory imposts or taxes upon imports—a though which was directly contrary to the intention of the framers of the Constitution. See:

Low v. Austin, supra, 13 Wall. 29.

The majority decision of the court below is directly contrary to the decision of this Court in *Crew Levick v. Pennsylvania*, 245 U. S. 292, 295, 297-8, where this Court held that an excise tax from gross receipts of sales for the privilege of conducting sales within Pennsylvania was in contravention of the Constitution when applied to export sales, saying in part

> "That it applies to internal as well as to foreign commerce can not save it; * * *"

Next, it is to be noted that immediately following the prohibition of the clause is the provision:

> "* * * except what may be absolutely necessary for executing it's Inspection Laws * * *"

First, the very fact of a single exception shows that no other limitation upon the absolute prohibition was intended by the framers of the Constitution. Second, if the clause be amended so as to insert the word "discriminatory," then the exception and amendment together would grant a clear right to each of the states to levy *discriminatory taxes for the execution of its inspection laws.*

We submit it is equally clear from the evils which the constitutional prohibition was intended to correct and from its history as shown by the Constitutional Debates, that the framers of the Constitution had no idea other than that of an unlimited and unqualified prohibition against state taxes upon either exports or imports. See:

Cook v. Pennsylvania, supra, 97 U. S. 566, 574;

Clark & Co. v. Clarke, supra, 3 Woods 408, 410, Federal Cases No. 2846, pp. 943, 945.

> "In arguing the case of M'Culloch v. Maryland, Luther Martin, Attorney General of Maryland, him-

self a member of the Constitutional Convention, said, 'The whole of this subject of taxation is full of difculties, which the Convention found it impossible to solve, in a manner entirely satisfactory. The first attempt was to divide the subjects of taxation between the State and the national government. This being found impracticable, or inconvenient, the State governments surrendered *altogether* their right to tax *imports and exports,* and tonnage; giving the authority to tax all other subjects to Congress, but reserving to the States a concurrent right to tax the same subjects to an unlimited extent.' "

United States v. County of Allegheny, supra, 322 U. S. 174, 176.

Necessarily, if the states surrendered "altogether" their right to tax exports and imports, reserving the concurrent right with Congress of taxation of other subjects, it is beyond the power of any state to levy a tax of any character upon exports or imports, except such as is necessary to enforce its inspection laws. There is no pretense that the tax here involved was for that purpose. Nor is there any pretense that the Congress of the United States had given its consent to the levying of such tax; or that if collected, it would be for the use of the Treasury of the United States.

We submit that the second ground upon which the court below placed its decision is wholly illogical and is as unsupported in principle and as contrary to the decisions of this Court as are each of the other two grounds upon which it is placed.

III.

The Supreme Court of the State of California Erred in Determining That the Tax Could be Sustained as an Excise Tax for the Privilege of Conducting a Retail Business in California.

At the outset of the final majority opinion of the court below, after a statement of facts and an outline of the Sales Tax Act, it is said:

> "In construing the above statutory provisions it has been definitely and squarely held by the courts of this state that:
>
> "'The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, *but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales.*'"
>
> 163 P. (2d) 1, 2. [R. 87.]

The opinion concludes thus:

> "In the instant case the tax imposed was a uniform nondiscriminatory excise tax *on the privilege of doing business in this state.* The transactions which was the basis for the tax was the sale of oil which was produced, refined, stored and delivered to the purchaser in this state."
>
> 163 P. (2d) 1, 5. [R. 92.]

We submit that the tax cannot be sustained upon this ground. The State of California, of course, can levy an excise tax upon individuals or corporations, foreign or domestic, for the privilege of transacting any intrastate

business within California. But it should be clear in principle, even without reference to the unbroken line of decisions by this Court to that effect, that no state can levy an excise tax upon anyone for the privilege of doing an import or export business or of making import or export sales. In view of the decisions of this Court thereon, further argument is unnecessary.

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."
>
> *Murdock v. Pennsylvania, supra,* 319 U. S. 105, 112.

In the early and famous case of *Brown v. Maryland,* 12 Wheat. 419, this Court speaking through Chief Justice Marshall, in rejecting the claim of Maryland that while it could not tax imports it could levy a tax upon the privilege of selling imports, said, in part:

> "The cause depends entirely on the question, whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported. * * *
>
> "But should it be proved, that a duty on the article itself would be repugnant to the constitution, it is still argued, that this is not a tax upon the article, but on the person. *The state, is said, may tax occupations, and this is nothing more.* It is impossible to conceal from ourselves, *that this is varying the form, without varying the substance.* It is treating a prohibition, which is *general, as if it were confined to a particular mode of doing the forbidden thing.* All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally, but this tax must be paid by those

who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. *So, a tax on the occupation of an importer is, in like manner, a tax on importation.* It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. *This the state has not a right to do, because it is prohibited by the constitution.*"

Brown v. *Maryland*, 12 Wheat. 419, 436, 444.

It is obvious, of course, that the rule applies with equal force to a tax upon the privilege of making export sales.

The mere fact, stressed by the majority opinion of the court below, that the oil had been produced in California cannot give the state the right to tax its exportation. All exports must be the product of some one of the states.

Following the quoted portion of the opinion in *Brown v. Maryland*, Justice Marshall continued:

"In support of the argument, that the prohibition ceases, the instant the goods are brought into the country, a comparison has been drawn between the opposite words export and import. As, to export, it is said, means only to carry goods out of the country; so, to import, means only to bring them into it. But suppose, we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is per-

ceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the states. *Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?* Or, suppose, revenue-cutters were to be stationed off the coast, for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased, the instant they were brought into the country, so the prohibition to tax articles exported ceased, when they were carried out of the country?"

Brown v. Maryland, 12 Wheat. 419, 445.

While in *Hooven & Allison Co. v. Evatt, supra*, 324 U. S. 652, this Court was divided as to whether the acts of the petitioner after it received the imported goods divested them of their character as imports, all of the justices were unanimous in the view that the above rules of *Brown v. Maryland* were as valid today as when first promulgated by Chief Justice Marshall. See, also:

Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 226-9;

Low v. Austin, supra, 13 Wall. 29;

United States v. Hvoslef, supra, 237 U. S. 1, 13;

Almy v. California, 24 Howard 169;

Wm. E. Peck & Co. v. Lowe, 247 U. S. 165, 173.

"1. Since Brown v. Maryland, 12 Wheat. 419, it has not been open to question that taxation imposed by the States upon imported goods, whether levied directly on the goods imported or indirectly by burdening the right to dispose of them, is repugnant to that provision of the Constitution . . ."

American Steel & Wire Co. v. Speed, supra, 192 U. S. 500, 519.

We submit the tax in this case cannot be distinguished from that condemned in *Crew Levick Company v. Pennsylvania, supra*, 245 U. S. 292, 295, 297-8. There, the statute of Pennsylvania, for the privilege of conducting business within the state, exacted a license of $3.00 upon each wholesale vendor and ½ mill on each dollar of the whole volume of business transacted annually, and like taxes at another rate on retail vendors. The appellant had made sales of $47,000 within Pennsylvania and $430,000 in foreign countries. A tax was levied of ½ mill upon its entire gross sales. Appellant by the action challenged the portion of the tax applicable to its export sales. In sustaining its contention and reversing the judgment of the Supreme Court of Pennsylvania, this Court said, in part:

"The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution.

* * * * * * * *

"We are constrained to hold that the answer must be in the affirmative.

* * * * * * * *

"That it applies to internal as well as to foreign commerce cannot save it; for, as was said in Case of the State Freight Tax, 15 Wall. 232, 277, 'The State may tax its internal commerce, *but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State.*' That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."

Crew Levick Company v. Pennsylvania, 245 U. S. 292, 295, 297-298;

See, also:

Anglo-Chilean Nitrate Sales Corp. v. Alabama, supra, 288 U. S. 218, 226-9.

It should require neither reason nor authority to demonstrate that a tax upon the proceeds of an export sale is in effect a tax upon an export. But it is immaterial whether the tax be regarded as a direct tax upon the export or a tax for the privilege of exporting goods or of making an export sale, since a tax upon the privilege of exporting goods or making an export sale is as offensive to the Federal Constitution as a direct tax upon the goods exported.

We submit that the third ground upon which the majority opinion is based is as fundamentally unsound, as erroneous, and as contrary to the decisions of this Court as the two preceding grounds.

Conclusion.

From the inception of the negotiations, both parties to the transaction had but one thing in mind: the exportation of oil to Auckland. The original invitation for bids called for furnishing oil for the New Zealand Division of the Royal Navy, the successful bidder to deliver it to the Control Board's vessel for transportation to new Zealand. Richfield being the successful bidder, a contract was entered into in New Zealand for the delivery of the oil to the purchaser's vessel with the necessary documents for its exportation, including the execution and delivery of a bill of lading consigning it to the Officer in Charge, Auckland, New Zealand. Thereafter, every step taken by either of the parties—the coming of the "Nucula" to the Marine Terminal, the pumping of the oil by appellant from its tank farm to its tanks at the Marine Terminal and from those tanks into the "Nucula," the execution of the bill of lading, export declaration and other shipping documents, were all steps incident and necessary to and a part of the exportation of the oil.

The decision of the court below, as we have pointed out, ignores the actualities of the case—that it was legally impossible after the oil was received by the "Nucula" to do other than take it to New Zealand, and that the delivery to the "Nucula" was as much a part of and as necessary to its exportation as was its carriage by the "Nucula" to New Zealand.

To say that this export sale is still subject to tax because the oil was conveyed from California to New Zea-

land by the purchaser is, we believe, to disregard entirely the Constitution and, in effect, to nullify its provisions. To say that the tax can be sustained because the same tax could have been levied upon an intrastate, and possibly upon an interstate, sale is likewise to ignore the provisions of the Constitution and would necessitate, as we have pointed out, an interpretative amendment by inserting the word "discriminatory" in the clause of the Constitution.

The attempt of the court below to sustain the tax on the ground that it is a tax upon the privilege of conducting business within this State is fallacious, contrary to both the letter and spirit of the Constitution and all the applicable decisions of this Court. It is true, as shown by the majority opinion of the court below, that the statute has been construed as levying a tax on the privilege of making retail sales within California. Limited to local sales, the act offends no provision of the Federal Constitution. When construed and applied, as it was by a majority of the court below, as requiring the same sales tax upon exports or upon the privilege of exporting goods, it offends the clear and unequivocal prohibition of the Constitution that no state, without the consent of Congress, shall levy any tax upon imports or exports.

We respectfully but confidently submit that we have sustained each and every Assignment of Error, all of

which are summarized in our Fourteenth and final Assignment, that:

> "The Supreme Court of the State of California erred in its final judgment in the above entitled cause in reversing the judgment of the Superior Court of the State of California."

We respectfully submit that the judgment appealed from should be reversed.

NORMAN S. STERRY,
ROBERT E. PARADISE,
Counsel for Appellant.

GIBSON, DUNN & CRUTCHER,
LLOYD & PARADISE,
Of Counsel.

APPENDIX.

The following are the applicable provisions of the Retail Sales Tax Act of 1933, as amended, and as in effect at the time of the sale and delivery of the oil to the New Zealand Government, other than Sections 23 and 31, which deal with the procedure by which an improperly or invalidly levied tax could be recovered and which are set forth as they existed at the time of the filing of the appellant's claim for refund and complaint. The appendix was submitted to counsel for appellee before being printed and counsel for the appellee have advised counsel for appellant that appellee agrees that the following sections are the applicable portions of the statute.

"§2. **Definitions.** The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

"(a) 'Person' includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, this State, any county, city and county, municipality, district or other political subdivision thereof, or any other group or combination acting as a unit, and the plural as well as the singular number.

"(b) 'Sale' means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes the fabrication of tangible personal property for consumers who furnish either directly or indirectly the materials used in the fabrication work and the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of

the person furnishing, preparing or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale.

"(c) A 'retail sale' or 'sale at retail' means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, except that the expressions 'transfer of possession,' 'lease,' and 'rental' as used in subdivision (b) of this section shall mean and include only such transactions as the board, upon investigation, finds to be in lieu of sales as defined in subdivision (b) of this section without the words 'lease or rental.'

"(d) 'Business' includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

"(e) 'Retailer' includes every person engaged in the business of making sales at retail; provided, however, that when in the opinion of the board it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for purposes of this act.

"(f) 'Gross receipts' means the total amount of the sale or lease or rental price, as the case may be, of the retail

sales of retailers, including any services that are a part of such sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expense whatsoever; provided, however, that cash discounts allowed and taken on sales shall not be included, and 'gross receipts' shall not include the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit, nor shall 'gross receipts' include the price received for labor or services used in installing, applying, remodeling or repairing the property sold.

"For the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed; provided, that the retailers shall establish to the satisfaction of the board that the tax imposed hereunder had been added to the sale price and not absorbed by the retailer.

"(g) 'Board' means the State Board of Equalization.

"(h) 'Tangible personal property' means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses.

"(i) 'In this State' or 'in the State' means within the exterior limits of the State of California and includes all territory within such limits owned by or ceded to the United States of America. (Amendment approved June 25, 1935; Stats. 1935, p. 1256.)"

Deering's General Laws of California 1935 Supplement, pp. 1956 and 1957.

"§3. **Rate of Tax.** For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes. (Amendment approved June 25, 1935; Stats. 1935, p. 1252.)"

Deering's General Laws of California 1935 Supplement, pp. 1957 and 1958.

* * * * * * * * *

"§5. **Exemptions.** There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act the following:

"(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

"* * * * * * * * *"

Deering's General Laws of California 1935 Supplement, p. 1958.

* * * * * * * * *

"§8. **Unlawful to advertise absorption of tax.** It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

"§8½ **Retailer to collect tax.** The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. This section is hereby declared to be separable and distinct from all other portions of this act, and shall not be deemed a consideration or inducement for the enactment of the whole or any portion of this act. If this section be for any reason declared invalid, the remainder of this act shall remain in full force and effect and shall be as completely operative as though this section had not been included herein."

1937 Vol. 2, Deering's General Laws of California, p. 3895.

* * * * * * * * *

"§12. **Retailer's permit: Application: Violation of section a misdemeanor.** Thirty days after the effective date of this act, it shall be unlawful for any person to engage in or transact business as a retailer within this State, unless a permit or permits shall have been issued to him as hereinafter prescribed. Every person desiring to engage in or conduct business as a retailer within this State shall file with the board an application for a permit or permits. Every application for such a permit shall be

made upon a form prescribed by the said board and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the board may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner thereof; in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority.

"*Violation of section a misdemeanor.* Any person who engages in the business of selling tangible personal property at retail in this State without a permit or permits or after a permit has been suspended, and the officers of any corporation which shall so sell, shall be guilty of a misdemeanor."

1937 Vol. 2, Deering's General Laws of California, pp. 3896 and 3897.

"§13. **Permit fee.** At the time of making such application, the applicant shall pay to the board a permit fee of one dollar for each permit and the applicant must have a permit for each place of business."

1937 Vol. 2, Deering's General Laws of California, p. 3897.

* * * * * * * * *

"§15. **Life of permit: Renewal fee.** Permits issued under the provisions of this act prior to April 1, 1935, shall expire on July 31, 1935, and must be renewed through filing an application for renewal on forms prescribed by the board. For each such renewal a fee of one

dollar must be paid at the time of filing the application therefor. If any retailer shall fail to apply for renewal of his permit or permits as herein required prior to August 1, 1935, a fee of one dollar and fifty cents must be paid for the renewal of each permit.

"*Renewal fee.* The board shall charge a fee of one dollar for the renewal or issuance of a permit to a retailer whose permit has been previously suspended or revoked. (Amendment approved June 25, 1935; Stats. 1935, p. 1259.)"

Deering's General Laws of California 1935 Supplement, p. 1959.

* * * * * * * * * *

"§23. **Overpayments: Credits and refunds: Claims: Interest: Recovery of erroneous refunds and credits: Illegal levies: Intentional overpayments.** If the board determines that any amount, penalty or interest has been paid more than once, or has been erroneously or illegally collected, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of what was legally due, and the person from whom it was collected, or by whom paid, and if approved by the State Board of Control the excess amount collected or paid shall be credited on any taxes then due from the retailer under this act or under the California Use Tax Act of 1935 and the balance shall be refunded to the person, or his successors, administrators, or executors. No refund shall be allowed unless a claim therefor is filed with the State Board of Equalization within three years from the fif-

teenth day after the close of the quarterly period for which the overpayment was made or, with respect to assessments made under the provisions of Sections 17 and 18 hereof, within six months after such assessments became final, or within 60 days from the date of overpayment, whichever period expires the later. No credit shall be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the board within such period.

Every such claim must be in writing and must state the specific grounds upon which the claim is founded.

Failure to file such claim within the time prescribed in this section shall constitute waiver of any and all demands against this State on account of overpayments hereunder within 30 days after disallowing any such claim in whole or in part, the board shall serve notice of such action on the claimant, such service to be made as provided by Section 17 hereof.

* * * * * * * * * *

(Amended by Stats. 1941, ch. 247, p. 1328, Sec. 10; Effective May 13, 1941; Operative July 1, 1941.)"

Deering's General Laws, Supp. 1941, pp. 2321-2.

"§31. **Remedies of taxpayer: Action to recover tax paid: Prerequisites to action: Time for commencement: Execution of judgment: Assignees.** No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection under this act of any tax sought to be collected, and no suit or proceeding shall be main-

tained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been duly filed as provided in Section 23 hereof.

"*Time for commencement.* Within ninety days after the mailing of the notice of the board's action upon such claim, the claimant may bring an action against the board on the grounds set forth in such claim in a court of competent jurisdiction in the county of Sacramento for the recovery of the whole or any part of the amount with respect to which such claim has been disallowed. If the board fails to mail notice of action on any such claim within six months after the claim is filed the claimant may, prior to mailing notice of action on such claim by the board, consider the claim disallowed and bring an action against the board on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment. Failure to bring suit or action within the time specified shall constitute a waiver of any and all demands against this State on account of any alleged overpayments hereunder.

"* * * * * * * * *"

Deering's General Laws of California, 1939 Supplement, p. 1589.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 14 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.
No. 46.

RICHFIELD OIL CORPORATION, a corporation,

Appellant,

vs.

STATE BOARD OF EQUALIZATION,

Appellee.

APPELLANT'S REPLY BRIEF.

NORMAN S. STERRY,
1000 Banks-Huntley Building, Los Angeles 14,
ROBERT E. PARADISE,
610 Title Insurance Building, Los Angeles 13,
Counsel for Appellant.

GIBSON, DUNN & CRUTCHER,
LLOYD & PARADISE,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

PAGE

Jurisdiction 2

Appellee advances neither reason nor authority to sustain the point that the judgment of the court below is not final within both the letter and the spirit of Section 237a of the Judicial Code 2

Introductory statement to appellant's reply to appellee's argument on the merits 8

Appellant's reply to appellee's argument on the merits 11

I.

Appellee's argument that the commerce and export clauses are synonymous, and the export clause permits the levying by the states of nondiscriminatory taxes upon exports, is contrary to the plain language of the Constitution and the intent of its framers, as evidenced by the constitutional history of the clause 11

(1) The commerce clause and the export-import clause are not synonymous and the export-import clause was intended to place upon the states tax restrictions not embraced in the commerce clause 12

(2) The constitutional debates make it clear beyond question that the framers of the Constitution intended to place a limitation upon the taxing powers of the states as to imports and exports not applicable to interstate commerce 20

PAGE

II.

Appellee makes no direct answer to our first point that the court below erred in holding that exportation of the oil did not commence until after the "Nucula" started from the marine terminal to New Zealand 29

(1) The claim of refund does not concede or show that exportation did not start until the "Nucula" cleared for New Zealand, or that any taxable event occurred prior to the exportation of the oil 30

(2) Appellee fails to distinguish the case of Spalding & Bros. v. Edwards from the case at bar and cites no authorities sustaining its contention that the sale here taxed was not an export sale 36

III.

Appellee advances neither reason nor authority to sustain the third ground of the majority decision of the court below that the tax can be sustained as a license tax for the privilege of doing business within the state 46

Conclusion 48

Appendices:

Appendix "A." Madison, Journal of Constitutional Convention (Scott's Ed., 1894), vol. 2, pp. 717-719 ..... App. p. 1

Appendix "B." Elliot, Debates on the Federal Constitution (Lippincott, 1907), vol. 3, pp. 481-483 ..... App. p. 3

TABLE OF AUTHORITIES CITED

CASES. PAGE

Baird, Estate of, 193 Cal. 225, 223 Pac. 974 5
Blount v. Monroe, 60 Ga. 61 ..... 29, 37
Brown v. Houston, 114 U. S. 622 ..... 29, 30
Brown v. Maryland, 12 Wheat. 419 46
Carson Petroleum Co. v. Vial, 279 U. S. 336 37
Clark v. Williard, 292 U. S. 112 5
Clarke & Co. v. Clarke, 3 Woods 408, Fed. Cases No. 2846, pp. 943, 944-5 ..... 29, 37
Coe v. Errol, 116 U. S. 517 ..... 16, 18, 29, 30
Cook v. Pennsylvania, 97 U. S. 566 25
Crew Levick Co. v. Pennsylvania, 245 U. S. 292 ..... 46, 47
Davidson v. Dallas, 8 Cal. 227 6
Davidson v. Dallas, 15 Cal. 75 ..... 6, 7
Dennis v. Roberts, 19 F. (2d) 1 33
Department of the Treasury v. Wood Preserving Corporation, 313 U. S. 62 ..... 37, 38
Fairbank v. United States, 181 U. S. 292 ..... 19, 23, 28
Farish v. Coon, 40 Cal. 33 33
Galveston etc. Railway Co. v. Texas, 210 U. S. 217 47
Henderson v. Mayor, 92 U. S. 259 47
Holmes v. Jennison, 14 Pet. 540 ..... 12, 13
Hooven & Allison Co. v. Evatt, 324 U. S. 652 16
Hughes Bros. v. Minnesota, 272 U. S. 469 ..... 34, 37
International Harvester Company v. Department of Treasury of Indiana, 322 U. S. 340 ..... 37, 38
Jorgensen v. Dahlstrom, 53 Cal. App. (2d) 322, 127 P. (2d) 551 33
Kansas City v. Bothin, 240 U. S. 227 47
Kidwell v. Ketler, 146 Cal. 12, 79 Pac. 514 ..... 32, 33

PAGE

Klauber v. San Diego Street Car Company, 98 Cal. 105, 32 Pac. 876 4

Low v. Austin, 13 Wall. 29 16

Marbury v. Madison, 1 Cranch. 137 ..... 13, 28

McGoldrick v. Berwind-White Coal Mining Company, 309 U. S. 33 38

Minnesota v. Blasius, 290 U. S. 1 18

Mower v. Fletcher, 114 U. S. 127 3

Nippert v. City of Richmond, 90 L. Ed. 496 41

Ogden v. Sanders, 12 Wheat. 213 13

Prout v. Starr, 188 U. S. 537 13

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90 37

Railroad Commission of Louisiana v. Texas etc. Co., 229 U. S. 336 ..... 34, 37

Randall v. Duff, 107 Cal. 33, 40 Pac. 20 4

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498 ..... 34, 37

Spalding and Brothers v. Edwards, 262 U. S. 66 ..... 10, 18, 19, 36, 37, 40

St. Louis etc. Railway Co. v. Arkansas, 235 U. S. 350 47

Sturges v. Crowninshield, 4 Wheat. 122 ..... 13, 28

Superior Oil Co. v. Mississippi, 280 U. S. 390 ..... 10, 18, 37, 38, 39, 40, 41

Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111 ..... 34, 37

Tupman v. Haberkern, 208 Cal. 256, 280 Pac. 970 4

United States v. Hvoslef, 237 U. S. 1 ..... 20, 35

Williams v. United States, 289 U. S. 553 13

Wright v. United States, 302 U. S. 583 13

Statutes.

PAGE

Code of Civil Procedure, Sec. 1859 33

Judicial Code, Sec. 237a 2, 3, 4

Rules of the State Board of Equalization, Rule 26 ..... 12, 44, 45

United States Constitution, Art. I, Sec. 8, Clause 3 ..... 1, 13, 15

United States Constitution, Art. I, Sec. 9, Clause 5 ..... 1, 14, 15, 35

United States Constitution, Art. I, Sec. 10, Clause 2 ..... 1, 8, 14, 15, 20, 25

Textbooks.

1 Elliot, Debates on the Federal Constitution (Lippincott, 1907), p. 377 26

3 Elliot, Debates on the Federal Constitution (Lippincott, 1907, p. 481 25

2 Madison's Journal, p. 539 23

1 Madison's Journal of the Constitutional Convention (Scott's Edition, 1894) 23

2 Madison's Journal of the Constitutional Convention (Scott's Edition, 1894) 23

Miller on the Constitution of the United States, pp. 591-2 ..... 20, 35

The Federalist (Hollowell Edition, 1842), No. XXXII, pp. 139-40 27

The Federalist and Other Constitutional Papers (Scott's Edition, 1898), pp. 883, 913-4 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.
No. 46.

RICHFIELD OIL CORPORATION, a corporation,

Appellant,

vs.

STATE BOARD OF EQUALIZATION,

Appellee.

APPELLANT'S REPLY BRIEF.

In replying to appellee's brief, we shall refer to our opening brief by the letter B and to appellee's brief by the letters AB. In the argument on the merits for brevity we shall sometimes refer to Clause 3, Section 8, Article I, of the Constitution as the commerce clause; to Clause 2, Section 10, Article I, either as the export clause or the import-export clause; to Clause 5, Section 9, Article I, as the federal export clause. As all of the applicable provisions of the Constitution are in Article I, when we refer to them by clause and section we shall omit the article.

Also, as in our opening brief, we shall refer to the New Zealand Stores Control Board as the Control Board, and to the acts of appellant's trustee predecessor in interest as the act of appellant.

All emphasis throughout this brief will be ours, unless it is indicated that italics are those of the text.

JURISDICTION.

Appellee Advances Neither Reason Nor Authority to Sustain the Point That the Judgment of the Court Below Is Not Final Within Both the Letter and the Spirit of Section 237a of the Judicial Code.

Appellee does not claim that any element of jurisdiction of this appeal is lacking other than that the judgment of the court below is not final. Appellee states that it presented the point because it felt it was its duty to do so, and frankly concedes that a dismissal of this case on that ground would not terminate this litigation. Indeed, reading between the lines, it is apparent that appellee feels, as we do, that the public interests demand as early a determination as possible of the nationally important constitutional question. That, of course, would not justify this court in entertaining the appeal if the judgment of the court below was not final within the meaning of Section 237a.

We are satisfied that it is final both within the letter and the spirit of that provision.

If this court were to dismiss the appeal on the ground the judgment was not final, it would mean that the parties would have to return to the Superior Court, which appellee concedes—as indeed it must—would have no discretion other than to enter judgment for the defendant.

Appellee asserts, however, on page 4 of its brief that in entering such judgment, the Superior Court would be acting judicially. In this, we believe, appellee is in error. Judicial action presupposes the exercise of discretion.

In the instant case, if the parties are compelled to return to the Superior Court, in order ultimately to present to this court the constitutional question involved, appellant would have to appeal to the Supreme Court of the State of California from the judgment that the Superior Court would be compelled to enter against appellant. Appellee does not challenge the proposition stated in our opening brief and sustained by the authorities there cited (B. 8-9) that the State Supreme Court would be bound by the decision appealed from, and by it just as much precluded from again considering the federal constitutional question involved in the litigation or reversing the judgment of the Superior Court entered in conformity with the decision appealed from, as it would be had the decision appealed from contained a specific direction to enter judgment for defendant.

In our opening brief, page 11, we cited the early cases of *Mower v. Fletcher*, 114 U. S. 127, 128. There judgment in favor of the defendants had been reversed with directions to enter judgment for the plaintiffs as prayed for in the complaint, and this court denied a motion to dismiss the writ of error, stating that the judgment of the state court was final and had determined the litigation between the parties. Ever since that decision the judgment of a state court reversing a judgment with directions to enter judgment for the appellee, has been held by this court to be a final judgment within the meaning of Section 237a. Yet, under the law of California, the party

against whom a judgment is entered by direction *has the same right of appeal as from a judgment entered against him after reversal without direction.* The Appellate Court is equally bound, in either appeal, by its prior decision. See:

Randall v. Duff, 107 Cal. 33, 36, 40 Pac. 20, 21;

Tupman v. Haberkern, 208 Cal. 256, 269, 280 Pac. 970, 976;

Klauber v. San Diego Street Car Company, 98 Cal. 105, 107, 32 Pac. 876.

In the first case cited, in answer to a motion to dismiss an appeal from a judgment entered on direction of the Supreme Court, it is said:

> "And such a judgment is as plainly within the language allowing appeals as any other. I think there can be no doubt of the right to appeal."
>
> *Randall v. Duff*, 107 Cal. 33, 36, 40 Pac. 20, 21.

The reason that ordinarily a reversal without directions is not final within the meaning of Section 237a is that the parties have a right to amend their pleadings and introduce new and different issues, and no matter how practically impossible that may appear, usually it cannot be said to be judicially impossible. They may also be able to offer different evidence. In the instant case, appellee does not—and obviously cannot—challenge our contentions as to the effect of the Sales Tax Act of California. In fact, it prints as an appendix the same

sections which we set out, which clearly requires a claim for refund to be presented within ninety days after payment of the tax and prohibits an action being brought *upon any other grounds than those stated in the claim.*

The only case cited by us in support of the finality of this judgment which appellee comments on is *Clark v. Williard, 292* U. S. 112.

On pages 16 and 17 of our opening brief we quoted from two carefully prepared law review articles, each interpreting the decision of this court in *Clark v. Williard,* as giving finality to the type of judgment here appealed from. Neither of these articles nor their reasoning are noted or replied to by appellee. On page 13 of its brief, however, it says:

> "In *Clark v. Williard, 292* U. S. 112, the judgment was reversed 'for further proceedings in accordance with the opinion.' The judgment of the California Supreme Court contained no such direction."

But under the numerous cases cited in our opening brief, it is apparent that the reversal contained the implied direction to the court below to proceed in conformity with that opinion.

Appellee does not challenge the rule stated in *Estate of Baird,* 193 Cal. 225, 258, 223 Pac. 974, 987, quoted in our brief, pages 14 and 15, that it is no part of the function of a trial court to decide whether the appellate court correctly decided the question, its sole duty being to fol-

low without question the principle established by the decision of the appellate court.

The decision of our Supreme Court in *Davidson v. Dallas,* 15 Cal. 75, seems to us conclusive on this point. It is true that it is an early case, but it has never been criticized, and it not only clearly states the law which has ever since prevailed in this state, but illustrates the limitation upon the rule that on a reversal without direction the case is at large.

In the *Davidson* case, judgment was rendered for the plaintiff and on appeal reversed, the opinion of the Supreme Court concluding:

> "The judgment of the Court below should be reversed, a new trial ordered, and the cause remanded for further proceedings."
>
> *Davidson v. Dallas,* 8 Cal. 227, 257.

On the retrial, the evidence being the same, the court entered judgment for the defendants. Plaintiff appealed. In affirming the judgment, the court reached the conclusion that its former decision was not correct, but that it was binding and conclusive upon the court, saying in part:

> "In the case of affirmance, there is no question of the finality of the judgment. Why in the case of reversal? It is true the case is remanded—but how? to be retried *in pursuance of the principles of law declared in the opinion.* The directions of the opinion become a portion of the judgment. The

opinion in this case remands the case for further proceedings, *and those proceedings are to be in pursuance of the principles of the opinion. This is, in effect, if not directly, a mandate to the Court below to follow the directions of the opinion of this Court, on new trial; to administer the law as laid down in the opinion."*

Davidson v. Dallas, 15 Cal. 75, 84.

Actually, the decisions cited in our opening brief at pages 8-9 are to the same effect.

In the instant case as we pointed out in our opening brief—and appellee does not challenge it—there would be nothing to retry in the Superior Court. The Sales Tax Act would prevent the appellant from amending its complaint to present any other or different grounds of recovery than those set out in its claim for refund. The Supreme Court of this state has finally and conclusively held that the facts stated in the claim for refund and realleged in the complaint plus the supplemental and explanatory facts stipulated to by the parties did not constitute an export sale within the meaning of any of the applicable clauses of the Constitution. This decision vitally affects the commerce of the nation, that of the inland states as well as of the seaboard states, and is final so far as the courts of California are concerned. We submit that both in principle and authority this court has jurisdiction to review that decision and determine the constitutional question which it presents.

INTRODUCTORY STATEMENT TO APPELLANT'S REPLY TO APPELLEE'S ARGUMENT ON THE MERITS.

Clause 2 of Section 10 in the most clear and explicit language prohibits any state without the consent of Congress from levying any tax or impost upon imports or exports. The clause by the clear language of the Constitution is an additional limitation upon the states not contained in the Commerce Clause, and was *precisely so intended by the framers of the Constitution.*

We believe, therefore, that the sole ultimate question in the case is whether or not the transaction was an exportation of the oil.

Appellee does not challenge our statement of the facts. It admits that pursuant to request for bids by the Control Board (appellant's bid being accepted) the oil was exported to New Zealand pursuant to a contract entered into between appellant and the Control Board for delivery of oil to the New Zealand Navy, the oil to be priced f. o. b. vessel-rail and delivered to the New Zealand government tanker "Nucula," consigned to the Officer in Charge at New Zealand. By the contract the captain of the "Nucula" was to keep the appellant advised of his approach [R. 23] He did so, and as the vessel neared the Marine Terminal, appellant started pumping oil from its tank farm at Watson to storage tanks at the Marine Terminal. As soon as the vessel docked and was ready to receive it, the oil was pumped aboard the "Nucula" from the storage tanks [R. 32]. That the transaction from start to finish contemplated and constituted an exportation of the oil seems to us undeniable.

The court below, however, held:

(1) That the exportation of the oil did not commence until the "Nucula" cleared for its return to New Zealand.

(2) That the power of the state to tax exports is coextensive with the power to tax interstate transactions, and since the Constitution did not forbid non-discriminatory taxes upon interstate commerce that do not interfere with congressional control thereof, the Constitution does not prohibit like state taxes upon exports.

(3) That the tax could be sustained as an excise tax for the privilege of conducting business in the State of California.

In our opening brief we discussed separately each of the three grounds on which the court below based its decision and believe we demonstrated that each was erroneous.

Appellee's brief does not challenge the accuracy of our analysis of the decision below, or suggest that it was not based on the grounds enumerated. Nor does appellee attempt *seriatim* to answer the points which we have made.

As to our first point, we can find no direct answer. There is no challenge to the argument that if the export clause were construed as prohibiting a tax only upon goods after being loaded into a vessel and after the vessel had cleared port, the constitutional provision practically would have been meaningless, and would not terminate any of the abuses which it was the intention of the framers of the Constitution to end.

None of the cases cited by appellee in support of its contention that the sale was a local one deal with export sales. *Superior Oil Co. v. Mississippi*, 280 U. S. 390 (the case upon which appellee places its greatest reliance), is factually entirely dissimilar from the instant case and was factually distinguished from the *Spalding* case. This Court held in the *Superior Oil Co.* case that the transportation of the gasoline out of the state was purely accidental and that there was nothing in any way which committed the purchaser to send the oil out of the state. In the instant case, the transportation of the oil to New Zealand was not accidental and the "Nucula" was legally compelled by the contract, the export declaration and the bill of lading consigning the oil to the Naval Officer in Charge at Auckland to transport the oil out of the state.

As we read appellee's brief it places its greatest reliance upon its argument that the Commerce Clause and the Import-Export Clause are synonymous. Hence we shall reply to that point first.

APPELLANT'S REPLY TO APPELLEE'S ARGUMENTS ON THE MERITS.

I.

Appellee's Argument That the Commerce and Export Clauses Are Synonymous, and the Export Clause Permits the Levying by the States of Nondiscriminatory Taxes Upon Exports, Is Contrary to the Plain Language of the Constitution and the Intent of Its Framers, as Evidenced by the Constitutional History of the Clause.

The conclusion of the majority of the court below that the states have the same power of taxing exports as they have of interstate commerce ignores the export clause *and interprets the Constitution as if the commerce clause were its only applicable provision.*

Appellee, without analyzing the two clauses, argues that they are identical in meaning and in their limitation upon the states. If this argument were sound, it would mean *that the import-export clause was useless surplusage.*

Appellee asserts (A. B. 17) that its contention that the commerce clause and the import-export clause are synonymous finds support in the constitutional debates and the history of the interpretation of the import-export clause.

In reply to appellee's argument, we will examine first, the language of the two clauses, and second, their constitutional history.

Before doing so, it is not inappropriate to point out that the appellee's entire argument is inconsistent with its enforcement of the Sales Tax Act. On page 10 of its brief, appellee states that the board has not attempted to tax sales where delivery was made to a common carrier.

In its Appendix B, appellee prints its Rule No. 26, which reads:

> "The California retail sales tax *does not apply* to gross receipts from sales made in *interstate or foreign commerce.*"

If, as appellee now contends, the Constitution of the United States does not prohibit any non-discriminatory tax on exports and the tax herein involved is non-discriminatory, then the Sales Tax Act applies and export sales no matter how consummated are subject to the Act, and appellee board has for years failed to enforce the statute.

(1) THE COMMERCE CLAUSE AND THE EXPORT-IMPORT CLAUSE ARE NOT SYNONYMOUS AND THE EXPORT-IMPORT CLAUSE WAS INTENDED TO PLACE UPON THE STATES TAX RESTRICTIONS NOT EMBRACED IN THE COMMERCE CLAUSE.

As noted, it is to be observed that if appellee's contention is correct, it would mean that the whole of the export clause is surplusage. This court has repeatedly held that no single word or sentence of the Constitution is to be so regarded.

In the very early case of *Holmes v. Jennison*, 14 Pet. 540, 570-1, Chief Justice Taney said:

> "In expounding the constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, *that no word was unnecessarily used, or needlessly added.* The many discussions which have taken place upon the construction of the constitution have proved the correctness of this proposition; and shown the high talent, the caution,

and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. *No word in the instrument, therefore, can be rejected as superfluous or unmeaning.* . . ."

Holmes v. Jennison, 14 Pet. 540, 570-1.

The above observations have been consistently followed by this court. See:

Williams v. United States, 289 U. S. 553, 572;
Wright v. United States, 302 U. S. 583, 588;
Ogden v. Sanders, 12 Wheat. 213, 316;
Prout v. Starr, 188 U. S. 537, 543;
Marbury v. Madison, 1 Cranch 137, 175;
Sturges v. Crowninshield, 4 Wheat. 122, 202.

Article I of the Constitution vests legislative power in the Congress of the United States. Section 8 enumerates the powers granted to Congress. The third clause reads:

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes:".

If this were the only Constitutional provision upon the subject, appellee's arguments would be sound, since Clause 3 of Section 8 grants identical power to Congress to regulate commerce among the states as with foreign nations.

The clause does not contain any direct limitation on either the states or Congress to tax commerce with

foreign nations or among the states. Nor is there any other provision of the Constitution in any manner attempting to limit the power of the states to tax commerce between the states. Hence, this court has held, as shown by the authorities cited in the opinion of the court below and in our opening brief, that the states are free to tax interstate commerce, except that taxes may not be discriminatory or of such a nature as to interfere with congressional control thereof.

From these decisions appellee argues that the states undoubtedly have the same power to tax exports. This was the view of the court below. The argument entirely overlooks the export clause. Hence, appellee is forced to the obviously illogical contention that the import-export clause is synonymous with the commerce clause.

Clause 5 of Section 9 reads as follows:

> "5. No tax or duty shall be laid on articles exported from any State."

Clause 2 of Section 10 reads:

> "2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

Thus we find the Constitution granting power to Congress to regulate commerce between the several states and with foreign nations, the clause granting that power containing no direct limitations upon the power of the federal

government or of the states to tax either commerce. We then find the Constitution by Clause 1, Section 8, granting to Congress specific power to levy imposts and duties on imports, but by Clause 5, Section 9, unqualifiedly and absolutely prohibiting a federal tax upon exports, and by Clause 2, Section 10, prohibiting the several states from levying *any* tax upon exports or imports without the consent of Congress, except such taxes as may be absolutely necessary for executing inspection laws.

Upon what possible basis then can it be said that the commerce clause and the import-export clause are identical or that a statute can not offend the import-export clause unless it also violates the commerce clause? The two do not even deal with the same subject.

In this connection, we desire to point out as emphatically as possible that the appellee has not answered or even commented on our argument (B 64) that the very fact of the exception in the Constitution permitting the levying of taxes absolutely necessary for the execution of inspection laws demonstrates beyond question that the framers of the Constitution did not intend *any other exception to the otherwise absolute prohibition of state taxation of imports and exports.*

Further, the prohibition of Clause 2, Section 10, is not against taxes on exports alone but against the levying of any tax upon imports as well. No one can contend that it was part of the scheme of the Constitution that the states should derive any income from imports. Yet if appellee's contention is correct, the several states have retained and today have the power of levying nondiscriminatory imposts upon imports. As shown in our

opening brief, this court squarely held in *Low v. Austin*, 13 Wall. 29, that a nondiscriminatory tax of the State of California on imports was in contravention of the import-export clause.

Appellee frankly admits (AB 33) that this court has twice held* nondiscriminatory state taxes upon imports to be a violation of the import-export clause, but argues that the point was overlooked by the court because not called to its attention by counsel. The fact in itself that such a construction of the Constitution *was not suggested by counsel or discussed by this court in those cases is almost conclusive that it is not permissible.*

Appellee sets forth and discusses many cases which are not at all applicable to any of the issues in the case at bar, and we believe quite seriously misinterprets many others.

On page 24 it intimates that the basis of the decision in *Coe v. Errol*, 116 U. S. 517, was that the tax was not a burden upon exportation. The statement is entirely erroneous. The case was one dealing with a tax claimed to be on interstate commerce and hence invalid. The appellant owned a mill in Maine and had, pursuant to a custom of many years, cut logs in Maine and, to get them to his mill, had floated them into New Hampshire where they were held by low water awaiting the spring freshets. He had also cut logs in New Hampshire and was holding also with high water to float them to the mill. The respondent Tax Collector assessed an ad valorem tax upon all of the logs. The proceeding was instituted in the Supreme Court of New Hampshire to abate the entire

*Hooven & Allison Co. v. Evatt, 324 U. S. 652; Low v. Austin, 13 Wall. 29.

tax. That state supreme court held the logs cut in Maine, although in New Hampshire, were in the course of an interstate journey and not subject to tax, but that the logs cut in New Hampshire, not having started on their journey, were subject to taxation. The state did not appeal from the portion of the decision against it, but Coe did, and the tax on the logs cut in New Hampshire was affirmed by this Court upon the ground that there had been no movement of them, and that the appellant could, or could not, send them out of the state, as he saw fit. In part, this Court said:

> "But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, *until they have been shipped*, or entered with a common carrier for transportation to another State, or *have been started upon such transportation in a continuous route or journey*. We think that this must be the true rule on the subject. * * * Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. *And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State.*" (Pp. 527-528.)

While, as noted, the state did not appeal from the decision annulling the tax as to the logs cut in Maine, this Court, in referring to that portion of the decision, said:

> "Such goods are already in the course of commercial transportation, *and are clearly under the protection of the Constitution.* And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation."
>
> *Coe v. Errol,* 116 U. S. 517, 525, 527, 528.

As noted in our opening brief (B 48), this case has been consistently followed and the rules which it announced have never been criticized or modified. We submit the delivery to the "Nucula" clearly started the oil on its journey to New Zealand. In fact, we believe it was so started when the appellant commenced pumping it from its tank farm at Watson.

In attempting to argue that the *Superior Oil Company v. Mississippi,* 280 U. S. 390, and the *Spalding and Brothers v. Edwards,* 262 U. S. 66, cases demonstrate that the commerce clause and the import-export clause are identical, appellee quotes from Justice Hughes in *Minnesota v. Blasius,* 290 U. S. 1, to the effect that the Commerce Clause does not prevent state taxation of interstate commerce where the tax does not interfere with the Congressional regulation thereof. Just how that decision sustains appellee's contention we are unable to ascertain.

On page 30, referring to the *Spalding* case, appellee says:

> "Unquestionably the case would have been decided the same way if a State tax had been involved and the goods had gone to Florida instead of Venezuela."

The error of this statement is at once apparent when it is borne in mind that the tax there condemned was a Federal Excise Tax applicable to all sales within the United States whether intrastate or interstate. This court held that as applied to an export sale, it was repugnant to the Federal Export Clause.

Appellee on page 28 frankly concedes that in the *Spalding* case the Solicitor General argued, as appellee argues here, that the Federal Export Clause did not prohibit nondiscriminatory taxes. While such argument is not mentioned in the opinion, it is evident that this court rejected it. The same contention, however, was advanced in the earlier case of *Fairbank v. United States,* 181 U. S. 292, and rejected by this court, which said in part:

> "This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated, it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation, *all exportation shall be free from national burden.*"

Fairbank v. United States, supra, 183 U. S. 281, 292.

From the language of the import-export clause it is equally evident that the framers of the Constitution intended that the states should likewise place no burden, nondiscriminatory or otherwise, upon exports.

See:

> Miller on the Constitution of the United States, pp. 591-2, cited with approval in *United States v. Hvoslef*, 237 U. S. 1, 13.

On page 63 of our opening brief we pointed out that in order to sustain the decision of the court below, Clause 2, Section 10, Article 1, must by interpretation be amended to read:

> "No State shall, without the Consent of Congress, lay any *discriminatory* Imposts or Duties on Imports or Exports * * *"

but that had the Constitution been so written, it would have permitted nondiscriminatory state taxation of imports as well; and also clearly the imposition of *discriminatory* taxation by the states for the execution of its inspection law. *Appellee does not notice this argument.*

(2) THE CONSTITUTIONAL DEBATES MAKE IT CLEAR BEYOND QUESTION THAT THE FRAMERS OF THE CONSTITUTION INTENDED TO PLACE A LIMITATION UPON THE TAXING POWERS OF THE STATES AS TO IMPORTS AND EXPORTS NOT APPLICABLE TO INTERSTATE COMMERCE.

We think appellee is in error in its statement (AB 18) that there was comparatively little discussion of the taxation of exports or imports. Appellee makes no reference whatever to the discussion in the several states of that

subject preceding the ratification of the Constitution and the only reference to the debates in the convention is that occurring on September 12, 1787.

For the convenience of the court, we have attached as Appendix "A" the entire portion of the debate on the subject on that date as reported by Mr. Madison, and as Appendix "B" the debate on the subject before the Virginia Convention between Mr. Mason and Mr. Madison.

However, appellee's own exposition and interpretation of the debates demonstrates that the framers of the Constitution did not intend to leave the states any right of taxation of either imports or exports, nondiscriminatory or otherwise.

Our interpretation of the debate referred to by appellee is that Mr. Madison's doubts were *not* to non-necessity of the import-export clause, but to the non-necessity of the exception contained therein with reference to the inspection laws.

Be that as it may, the sum and substance of the appellee's reference to these debates is that Messrs. Ellsworth, Madison and Fitzsimmons thought that the import-export clause was unnecessary and that the interests of all of the states, including the inland states, were safeguarded by the commerce clause. Appellee then naively says (AB 19):

> "It is apparent, however, that the inland States were not satisfied with these assurances *and demanded the express prohibition of such levies.*"

The above statement is obviously correct.

What, then, is the situation disclosed by appellee's own interpretation of the constitutional history? The Convention had apparently agreed upon the commerce clause. When it took up consideration of the import-export clause, certain of the members doubted its necessity, thinking the commerce clause was sufficient, but the inland states were not satisfied that the commerce clause contained any limitations upon the powers of the states to tax imports and exports and *demanded express prohibition of such levies.*

Had the framers of the Constitution intended that the states should have the same power to tax exports as to tax interstate commerce and no more or less, they would have either (a) omitted the export clause or limited it to imports; or (b) included in the clause, commerce between the states.

Clear as this appears both from the language of the Constitution and from its history as outlined by appellee, it is emphasized by the reference to the further debates thereon and the discussions of the clauses prior to ratification.

A study of the Journal of the convention will show that the question of prohibition of taxation of exports either by the federal government or the states was before the convention several times and at the outset there were very divergent views thereon. An examination of the debates will show that the principal controversy was as to the prohibition of taxation of such exports by the federal government, as apparently a majority but not all of the delegates from the start seemed in favor of prohibiting taxation of imports or exports by the states. In any event, the subject was before the convention on May 27,

1787 (pp. 192-3*); on July 12, 1787 (p. 302); on July 23, 1787 (p. 357); on August 6, 1787 (p. 379); on August 8, 1787 (p. 391), and on August 16, 1787 (p. 432 *et seq.*). The debate on this subject at this session was quite long. According to Madison's Journal:

> "MR. MADISON. First the power of laying taxes on exports is proper in itself; and, *as the states cannot with propriety exercise it separately*, it ought to be vested in them collectively.
>
> * * * * * * * *
>
> "MR. WILLIAMSON considered the clause proposed against taxes on exports, as reasonable and necessary."
>
> Madison's Journal, vol. 2, p. 539.

Mr. Langdon opposed the adoption of a federal export clause because it left the states free to tax exports; which *"could not be admitted"* (p. 572).

As pointed out in the decision of this court in *Fairbank v. United States, supra*, 181 U. S. 283, 292-3, Mr. Clymer moved that after the word "duty" in the federal export clause should be inserted the words "for the purpose of revenue," but the motion was defeated (p. 576).

The federal export clause was adopted on August 21, 1787 (p. 577).

On August 6, 1787, the import-export clause was presented to the convention and debate on it (to which we believe appellee referred) occurred on the 12th of August.

---

*All page references are to Madison's Journal of the Constitutional Convention (Scott's Edition, 1894), Vols. 1 and 2.

Mr. Mason, one of the delegates to the convention from Virginia, wrote a pamphlet against its ratification addressed to the citizens of Virginia. In that pamphlet he said:

> "The state legislatures are restrained *from laying export duties on their own produce* * * *."
>
> The Federalist and Other Constitutional Papers (Scott's Edition, 1898), p. 883.

James Iredell wrote a pamphlet in which he considered each specific objection by Mr. Mason. In answer to Mason's objection to the export clause he said, in part:

> "IX OBJECTION. 'The State Legislatures are restrained from laying export duties *on their own* produce.'
>
> * * * * * * * *
>
> "Every duty laid upon exported produce operates in fact as a tax by the exporting State upon the non-exporting State * * * and to remove as much as possible every ground of discontent, Congress itself are prohibited from laying duties on exports, because by that means those States which have a great deal of produce to export would be taxed much more heavily than those which had little or none for exportation."
>
> The Federalist and Other Constitutional Papers (Scott's Edition, 1898), pp. 913-4.

Mr. Mason did not rest upon his pamphlet but as a delegate to the Virginia ratifying convention vigorously assailed the export clause, both because it limited and interfered with the right of Virginia to defray the expenses of inspection and unjustly deprived Virginia

of the income it had always enjoyed from taxation of exports. The clause was defended by Madison as entirely just when considered from the national viewpoint and that of the inland states.

Mr. Mason in attack upon the import-export clause said in part (italics are as in the text):

> "For forty years we have laid duties on tobacco, to defray the expenses of the inspection, and to raise an incidental revenue for the state. Under this clause, that incidental *revenue* which is calculated to pay for the inspection, and to defray contingent charges, is to be put into the federal treasury."
>
> Elliot, Debates on the Federal Constitution (Lippincott, 1907), vol. 3, p. 481.

In *Cook v. Pennsylvania*, 97 U. S. 566, 574, it is stated that Rhode Island because of the revenues of which she would be deprived by Clause 2, Section 10, did not ratify the Constitution until three years after ratification by the other twelve states.

In our opening brief (B 64-65) we quoted from the decision of this court quoting Luther Martin, the attorney general of Maryland, as stating in argument of *M'Culloch v. Maryland* that the state governments surrendered *altogether* their right to tax imports and exports, giving to the government the authority to tax all other subjects, but reserving to the states the right to tax the same subjects to an unlimited extent. Luther Martin in his

letter to the convention which finally ratified the Constitution in speaking of the clause said:

> "By this same section, every state is also prohibited from laying any imposts, or duties, on imports or exports, without the permission of the general government. It was urged that, as almost all sources of taxation were given to Congress, it would be but reasonable to leave the states the power of *bringing revenue into their treasuries by laying a duty on exports*, if they should think proper, *which might be so light as not to injure or discourage industry, and yet might be productive of considerable revenue;* also, that there might be cases in which it would be proper, for the purpose of encouraging manufactures, to lay duties to prohibit the exportation of raw materials, and, even in addition to the duties laid by Congress on imports, for the sake of revenue, to lay a duty to discourage the importation of particular articles into a state, or to enable the manufacturer here to supply us on as good terms as they could be obtained from a foreign market. *However, the most we could obtain was, that this power might be exercised by the states with, and only with, the consent of Congress,* and subject to its control; and so anxious were they to seize on every shilling of our money for the general government, that they insisted *even the little revenue, that might thus arise, should not be appropriated to the use of the respective states where it was collected, but should be paid into the treasury of the United States; and accordingly it is so determined.*"
>
> Elliot, Debates on the Federal Constitution (Lippincott, 1907), vol. 1, p. 377.

Alexander Hamilton in The Federalist, in urging the adoption of the Constitution, said:

> "* * * yet I am willing here to allow, in its full extent, the justness of the reasoning, which requires, that the individual states should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession I affirm, that *(with the sole exception of duties on imports and exports)* they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense * * *"

> The Federalist, (Hollowell Ed., 1842), number XXXII, pp. 139-40.

It would thus appear certain that the men who drafted the Constitution knew that they were prohibiting entirely the levying of any state taxes upon imports and exports, and they used clear words to express that intent.

On page 20 of its brief, appellee says:

> "It would seem that if the exponents of States rights in the Convention had thought that the export-import clause would be interpreted to preclude the levy of nondiscriminatory excises, they would have objected vehemently to the provision."

It is obvious from the history of the clauses set out, both by ourselves and appellee, that the representatives of some of the seaboard states did object most vehemently both in the convention and later to their respective states, *but that their objections did not prevail.*

The observations of this court in the early case of *Sturges v. Crowninshield,* 4 Wheat. 122, 202, are pertinent:

> "Before discussing this argument, it may not be improper to premise that, although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, *that a case for which the words of an instrument expressly provide, shall be exempted from its operation.*"
>
> *Sturges v. Crowninshield,* 4 Wheat. 122, 202.

See, also:

> *Marbury v. Madison,* 1 Cranch. 137, 175.

So, we find that although a minority of the delegates to the convention did not agree to the principle, the majority intended to prohibit both the national government and the several states from levying any taxes of *any character* upon exports, and used the clearest and most unambiguous language possible to effect that intention. The observations of this court in *Fairbank v. United States, supra,* 181 U. S. 283, 290, are most pertinent:

> "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.' *Whether such provision is or is not wise is a question of policy with which the courts have nothing to do.*"
>
> *Fairbank v. United States;* 181 U. S. 283, 290.

II.

Appellee Makes No Direct Answer to Our First Point That the Court Below Erred in Holding That Exportation of the Oil Did Not Commence Until After the "Nucula" Started From the Marine Terminal to New Zealand.

As noted, the appellee does not challenge our statement of facts. It concedes that the parties had contracted for the exportation of the oil from California to New Zealand by delivery by appellant to the R. F. A. "Nucula" and carriage by that vessel to New Zealand. Nor does appellee attempt to answer our contentions, supported by the numerous authorites cited in our opening brief (1) that delivery of the oil to the "Nucula" was a necessary, incidental part of, and step in, its exportation; (2) that exportation of the goods commences with their first movement towards the sea. Neither does appellee directly, or at all, as we read its brief, attempt to sustain the rule upon which the California Supreme Court mainly based its decision, viz.: that exportation of goods does not start until after the vessel into which they have been loaded has cleared for a foreign port. Neither is there any reply to that portion of the decisions of *Blount v. Monroe*, 60 Ga. 61, 65-6, and *Clarke & Co. v. Clarke* (C. C. Ga.), 3 Woods 408, 410-411, Federal Cases No. 2846, pp. 943, 944-5, pointing out that the exception in the export clause permitting the levy of imposts necessary to carry out inspections shows conclusively that it could not have been the intention of the framers of the Constitution that an export did not start until the goods were on board ship. On page 24, these cases are dismissed with the statement that they were prior to the decision of *Brown v. Houston*, 114 U. S. 622, and *Coe v. Errol*, 116 U. S. 517, and

appear contrary to those decisions. We think the factual situation is different, and that there is no conflict between the decisions. In any event, neither *Brown v. Houston* nor *Coe v. Errol* considered the point we are discussing.

Appellee argues:

(1) That the claim of refund conceded, or admitted, that the oil was not exported until the "Nucula" started for New Zealand.

(2) That the delivery of possession of the oil and the passing of title, both within the state, constituted an intrastate or local sale, notwithstanding the fact that such passage of title and delivery of possession was in accordance with the terms of the contract for exportation of the oil and irrevocably committed it to exportation.

We will answer each contention separately.

(1) THE CLAIM OF REFUND DOES NOT CONCEDE OR SHOW THAT EXPORTATION DID NOT START UNTIL THE "NUCULA" CLEARED FOR NEW ZEALAND, OR THAT ANY TAXABLE EVENT OCCURRED PRIOR TO THE EXPORTATION OF THE OIL.

On pages 12-13, appellee says:

> "But in its claim for refund, which Appellant concedes is binding upon it, it stated that the oil was loaded onto the tanker on May 14, 1937, and that it 'was thereafter duly exported on May 15, 1937 from Long Beach, California to Auckland, New Zealand * * *.' [R. p. 13.]"

> "This is an accurate statement of what happened. The oil was exported by the purchaser the day after it was loaded upon its vessel."

This play on words has not been previously suggested by appellee, nor was it considered by either of the courts below. Clearly the word "exported" in the above excerpt was used in the sense of the word "transported."

We do not believe that the excerpted sentence, standing alone and by itself, contains any concession that the oil was not in process of exportation when being delivered to the vessel, or that loading the oil upon the vessel was not a necessary step in exportation. Certainly it is not when read in connection with the entire claim, which is found in the record at pp. 11-15. It sets out the transaction in detail, the invitation by the Control Board in New Zealand for bids "for the supply of a cargo of fuel oil required for the New Zealand Division of the Royal Navy" [R. 12-13]; the acceptance of appellant's bid [R. 13]; the written agreement by appellant to supply fuel oil to the New Zealand Navy, the oil to be delivered at designated price f.o.b. Los Angeles to the order of the Secretary of the Navy at Wellington, N. Z. into New Zealand Naval Tank Steamer R. F. A. "Nucula," and for the issuance of bills of lading and the customary shipping documents consigning the oil to the Naval Officer in Charge, at Auckland, New Zealand [R. 13]. The claim then alleged:

> "Pursuant to such written agreement dated February 4, 1937, the taxpayer on May 14, 1937 *loaded at its Long Beach, California, terminal into the New Zealand Naval tank steamer R. F. A. 'Nucula'* 43,756.85 barrels of fuel oil in bulk to be delivered to the Naval Officer in Charge at the Port of Auckland, New Zealand, as evidenced by copy of Bill of Lading dated May 14, 1937, signed by Geo. Atwood, Master of the R. F. A. 'Nucula' and now in tax-

payer's possession. Such fuel oil was thereafter duly exported on May 15, 1937 from Long Beach, California, to Auckland, New Zealand, as evidenced by United States Customs Service Form 7527, Shipper's Export Declaration, a copy of which the Taxpayer has in its possession." [R. p. 13.]

It will be thus observed that the claim set forth all of the facts which the appellant urged in the court below and here contends constitutes an exportation of the oil, a state tax upon which is forbidden by the Constitution of the United States. If, as we believe, it is the law that goods are in exportation with their first movement towards the sea, and that loading goods upon a vessel is a necessary and essential step in their exportation, the claim, under the rules governing pleadings in this state, was amply sufficient.

In *Kidwell v. Ketler*, 146 Cal. 12, 17-18, 79 Pac. 514, 515-6, the court, in passing upon the construction by the Superior Court of a trust, said:

> "Thus at the threshold of the inquiry as to the true construction of the trust, appellants are met with the objection of the respondent that they are bound, first, by their admissions of the allegations of his complaint, and, second, by the identical affirmative allegation which they have made in their cross-complaint. But, answering the respondent's objection, it is to be noted that both in the complaint and in the cross-complaint, the will of Jacob Beideman is set forth in full, and the deraignment of title is shown in both instances to be from the trust clause of that will. The case presented, therefore, is one where the pleader sets forth his chain of title, and upon that chain pleads ownership. It is uniformly held

that an allegation made under such circumstances is an allegation of a conclusion of law not calling for a denial, and not binding upon either party. * * * And, as is said in Brown v. Newall, 2 Nylne & C., 558, 'Now it is a rule of pleading that although a party is bound by the facts which he states, he is not bound by his statement of the legal consequences of those. *It is for the court to judge what are those legal consequences.*'"

Kidwell v. Ketler, 146 Cal. 12, 17-18, 79 Pac. 514, 515-6.

See, to the same effect:

Farish v. Coon, 40 Cal. 33, 52-53;

Jorgensen v. Dahlstrom, 53 Cal. App. (2d) 322, 331, 127 P. (2d) 551, 555;

Code of Civ. Proc., sec. 1859;

Dennis v. Roberts (C. C. A. 9), 19 F. (2d) 1, 2.

On page 13 of its brief appellee states that it does not appear whether the oil flowed by gravity through appellant's pipelines or was lifted by winches on to the dock, and that the method of loading would make a difference.

We are unable to comprehend what difference it would make whether the oil was loaded in barrels by winches or flowed through pipe lines. *Either method would move the oil into the carrier vessel,* and either would be an essential step in its exportation. However, appellee is in error in its statement.

It was stipulated that appellant's refinery at Watson was connected with its storage tanks at the Marine Terminal by a pipe line [R. 31]; that when advised that the "Nucula" was twenty-four to forty-eight hours from

the Marine Terminal, appellant started pumping oil from its refinery tanks to its storage tanks [R. 32]; that there are no records available to

> "show whether on either trip the 'Nucula' was ready to receive the oil before the entire cargo had been pumped into the storage tanks, but the oil was not held in the tanks more than twenty-four to thirty-six hours before the plaintiff started pumping it from the storage tanks into the 'Nucula.' After the pumping of said oil from the storage tanks into the 'Nucula' was started, it was continued without interruption until the entire cargo was delivered into the tanks of the 'Nucula'." [R. 32.]

Clearly, under the authorities cited in our opening brief*,—and appellee has cited none to the contrary,—the exportation of the oil started when appellant commenced pumping the oil from its tank farm at Watson to its storage tanks at the Marine Terminal, and it certainly was moving in exportation when it was being pumped from the latter tanks into the "Nucula." In any event, the act of loading it on to the vessel in any manner was *an act incident to, and a necessary part of and step in, its exportation. Otherwise, the contract for its exportation could not have been fulfilled and the oil could not have reached New Zealand.*

---

*Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 126;

Railroad Commission of Louisiana v. Texas etc. Co., 229 U. S. 336, 341;

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 526-7;

Hughes Bros. v. Minnesota, 272 U. S. 469, 475-6.

Exportation of goods by sea necessarily involves getting them upon the vessel as well as their carriage by the vessel to a foreign country. We submit that if any step in the process of exportation of goods is made taxable under any guise, then the import-export clause will have been completely nullified.

In *United States v. Hvoslef*, 237 U. S. 1, 13, this Court in holding that Clause 5 of Section 9, Article I, prevents the Federal Government from taxing exports and prohibited it from requiring revenue stamps upon charter parties, said:

> "'It was the clear intent of the framers of the Constitution that the process of exporting the products of a State, the goods, chattels, and property of the people of the several states, *should not be obstructed or hindered by any burden of taxation.*'"
>
> *United States v. Hvoslef*, 237 U. S. 1, 13.

Miller, in his work on the *Constitution*, cited with approval in the above decision, says:

> "The prohibition in regard to duties on exports, which, by another clause, is also a limitation upon the power of the Federal Government, makes it very clear that the Constitution intended that no product of a State which was in the process of exportation should be taxed either by a State or by the Federal Government; in other words, *that the process of exporting the products of a State, the goods, chattels, and property of the people of the several States, should not be obstructed or hindered by any burden of taxation imposed by either State or Federal authority.*"
>
> Miller on the Constitution of the United States, pp. 591-2.

(2) Appellee Fails to Distinguish the Case of Spalding & Bros. v. Edwards From the Case at Bar and Cites No Authorities Sustaining its Contention That the Sale Here Taxed Was Not an Export Sale.

While there can be no denial that the delivery of the oil to the "Nucula" (which passed possession and title thereof to the purchaser) was in accordance with the contract for the exportation of the oil to New Zealand and a necessary and incidental part of and step in such exportation, the appellee contends that the passage of title (which it asserts was a mere happenstance (AB p. 13) coupled with change of possession of the oil made the sale a local or intrastate sale subject to tax.

We believe that the acts of the appellant in the case at bar are identical in their legal effect with the acts of the appellant in *Spalding & Bros. v. Edwards*, 262 U. S. 66, 67, where this court held that notwithstanding the fact that both title and possession of the exported goods passed to the vendee within this country, the federal export clause forbade the application to the sale of a federal sales tax. On pages 41 to 46 of our opening brief we argued that the case at bar could not be distinguished from the *Spalding* case and pointed out (B 44-45) that this was the conclusion of the first decision of the court below and was adhered to by the Chief Justice in his dissenting opinion, concurred in by Justice Edmonds.

We are unable to find in appellee's brief any attempt to distinguish the *Spalding* case from the one at bar other than that delivery was there to a common carrier, and appellee's erroneous assertion, heretofore noted, that the

decision would have been the same had the sale been an interstate one.

In support of its contention that the transaction constituted a local sale, appellee cites no case dealing with an export, nor does it attempt to distinguish the principles of the many cases cited in our opening brief that an export starts with the first movement of the goods to the sea*, and that loading goods upon a vessel is a necessary and incidental part of their exportation.**

Appellee cites in support of its contention *Superior Oil Co. v. Mississippi*, 280 U. S. 390; *Department of the Treasury v. Wood Preserving Corporation*, 313 U. S. 62, and *International Harvester Company v. Department of Treasury of Indiana*, 322 U. S. 340.

The last case cited may be dismissed from consideration for the reason the decision was not based upon the fact that the taxed sales were local, but that as shown by the excerpts from that decision quoted in our opening

---

**Texas & N. O. R. Co. v. Sabine Tram Co., supra*, 227 U. S. 111, 126;

Railroad Commission of Louisiana v. Texas etc. Co., supra, 229 U. S. 336, 341;

Southern Pacific Terminal Co. v. Interstate Commerce Commission, supra, 219 U. S. 498, 526-7;

Hughes Bros. Timber Company v. Minnesota, supra, 272 U. S. 469, 475-6;

Spalding & Brothers v. Edwards, supra, 262 U. S. 66, 68-9;

Carson Petroleum Co. v. Vial, 279 U. S. 336-7;

Blount, Sheriff, et al. v. Munroe, supra, 60 Ga. 61, 65-66;

Clarke & Co. v. Clarke, supra, 3 Woods 408, 410, Federal Cases No. 2846, pp. 943, 944-5.

***Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 92-4.

brief, pages 58-59, there was no constitutional prohibition against a state taxing interstate commerce where such taxes were nondiscriminatory and of such a nature as not to burden that commerce unduly or interfere with congressional control thereof.

The *Wood preserving* case dealt with an interstate transaction and not with an export sale. It was placed upon the ground apparently that the sale there involved was an intra, and not an interstate sale. As we have pointed out, however—and appellee does not and cannot challenge it—the later decisions of this Court; especially *International Harvester Company v. Department of Treasury of Indiana, supra,* show that the real basis of that decision was the same as in *McGoldrick v. Berwind-White Coal Mining Company,* 309 U. S. 33, 46-7, and numerous other decisions cited in the opinion of the court below, viz., that interstate commerce is not immune from taxation which is not discriminatory and which does not unduly burden it or interfere with congressional control thereof.

But, as we have so repeatedly pointed out, we are not dealing with a case of interstate commerce but with an export sale, a state tax upon which is clearly and unequivocally prohibited by the export clause.

The question in *Superior Oil Co. v. Mississippi, supra,* 280 U. S. 390, was whether the taxed sales were intra or interstate. Under the contentions of the appellee and the many decisions cited, the tax there challenged was probably valid whether the transactions were intra or interstate. The decision, however, seems to assume the contrary and is based on the premise that they were intrastate sales.

From the appellee's statement, one might think the factual situation of the instant case quite similar. An examination of Justice Holmes' opinion will show that there is no similarity whatever. In the *Superior Oil* case the appellant sold gasoline to packers at Biloxi in the State of Mississippi and delivered it to the packers' wharves. The contract of purchase did not bind the packers, as did the contract in the instant case, to carry the oil outside the state or to make any use or disposition of it, so that it was both physically and legally possible for the packers to have used or sold it within the State of Mississippi, or to have made any other disposition of it they saw fit. Actually, the packers placed the oil upon their own boats, transported it outside of the state, and sold it to certain shrimp fishermen in Louisiana, although there was no legal or other obligation upon them to do so. It is also true that the oil company in each case received from the purchaser (although the time of such receipt does not clearly appear from the opinion) what was denominated a bill of lading, reading in part: "Consigned to Gussie Fontaine Pkg. Co. Destination: Grants Pass, La." With reference to this document and the claim that it committed the oil to interstate transportation, we quote from the opinion of Justice Holmes:

> "The instrument then provided that 'the property consigned herein remains the property of said Superior Oil Company until it shall be delivered to consignee or consignee's agent at point of destination', with provisions throwing all risks upon the purchasers. The seller of course paid no freight. The document seems to have had no other use then, as the supreme court of Mississippi said, *to try to convert a domestic transaction into one of interstate com-*

merce. There was no consignee at the point of destination. The goods were delivered to the so-called consignee before they started, and were in its hands throughout. There was no point of destination for delivering of the oil but merely a neighborhood in which the packers that had bought it and already held it expected to sell it again. *The document hardly can affect the case,* because it is 'not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause.' "

Superior Oil Co. v. Miss., 280 U. S. 390, 394-5.

In distinguishing the case from *A. G. Spalding & Bros v. Edwards,* 262 U. S. 66, Justice Holmes said:

"But here the gasolene was in the hands of the purchaser to do with as it liked, *and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes.*

* * * * * * * *

"But on the other hand, the desire to make its act an act in commerce among the states was equally unimportant *when it was apparent that the buyer's journey to Louisiana was accidental so far as the appellant was concerned.*"

Superior Oil Co. v. Mississippi, 280 U. S. 390, 395-6.

In the instant case, the transportation of the oil to New Zealand was not accidental, nor was the situation

in any way similar to that of the *Superior Oil Company* case, where it was determined there was nothing that in any way committed the appellant in that case to send the oil out of Mississippi. In the instant case when the "Nucula" received the oil, it was compelled by the contract, by the export declaration, and by the bill of lading consigning the oil to the Naval Officer-in-Charge at Auckland to transport the oil to New Zealand. The delivery of the oil to the "Nucula" was, as we have so often pointed out, a necessary step in its exportation, and to attempt to carve out and segregate a single taxable incident is entirely absurd and comes squarely within the observations of this Court in *Nippert v. City of Richmond* (not yet officially reported), 90 L. Ed. 496, 500, to which appellee has made no reply.

From the time the Control Board first asked for bids for oil for the New Zealand Navy, everything done by the respective parties to the transaction looked towards and was a step in the exportation of the oil to New Zealand. That it was in fact exported is not, and can not, be denied. But, appellee asserts, the State may, nevertheless, levy a sales tax upon the transaction because both title and possession of the oil passed to the purchaser within the confines of this state.

The constitutional inhibitions against state taxation of exports make no exception to transactions wherein title or possession, or both, pass to the exportee within a state, but forbid state taxation of *any export*. In other words, if a transaction constitutes an exportation of goods, the

Constitution clearly forbids any state taxation thereof regardless of whether the goods are carried to the foreign country by the exporter, the exportee, a carrier or a common carrier.

Of course, this does not mean that where a sale is independent of any exportation of the goods and is completed within the state that it may not be taxed by the state because the purchaser thereafter and independent of the sale carries the goods to a foreign country, but it does mean that the state may not tax the sale where either delivery of possession or passage of title to the goods, or both, *is a part of and necessary incident to and a step in their exportation to a foreign country by either vendor or vendee.*

Let us assume that in the interests of the national defense, Congress, prior to this transaction, had enacted a statute under the commerce clause forbidding the exportation of oil, and that the appellant had been indicted for violation of that statute. Would anyone contend that the appellant could defend its actions upon the ground that it had not exported the oil, but had merely made a local sale of it by passing title and possession in California to the purchaser by delivering the oil to the purchaser's vessel sent here pursuant to contract with appellant *for the express purpose of carrying the oil out of California and to a foreign country?*

Appellee strenuously argues (AB 9-11) that any rule which would prohibit a state from taxing an export

sale where the goods were not delivered to a common carrier would work great confusion and injustice, saying on pages 9-10 of its brief:

> "If a tourist buying jewelry were exempt from taxes on purchases which he made while visiting in a State, local residents might claim to be tourists. The same administrative difficulties would be encountered if out-of-state businessmen were free to send their trucks, or railroad cars or ships into the State to take possession of goods purchased from local vendors."

This is substantially the same argument as that used by the court below except that the opinion of the court below assumed that a banjo was sold to a Mexican who declared verbally or by affidavit that he intended to export it.

Of course, nothing is better settled by the decisions of this court, or more firmly grounded in reason, than that the mere intention of a purchaser to export articles which he purchases do not make the sale an export. The rule rests on the soundest logic and consideration of public policy. If it were otherwise, both retailers and the state would be subject to innumerable frauds. For example, if a purchaser in a retail store sought to buy an overcoat, claiming he intended to send it to his son who was overseas, from the very necessity of the case his declaration could not exempt the sale from the sales tax. There would be no way of ascertaining the fact that he carried out his express intention, and there would be no legal

compulsion upon him to do so. Even if his declaration had been honestly made, and not with fraudulent intent of defeating the tax, he could still change his mind or make a local disposition of the garment. On the other hand, if the purchaser pays for the overcoat and contracts that it be shipped by mail or express to his son in a foreign country, under the regulations of the appellee there is no tax upon the sale. Why? It has been consummated wholly within the state, but its consignment to a common carrier has assured its being exported from the state. That is why in the usual and normal course of events the delivery to a common carrier will exempt a sale, where the delivery to the purchaser in the state under such circumstances that he can or cannot export the article will not exempt it. Where, however, the delivery is under such circumstances as disclosed in the case at bar, that the act is necessarily part of the exportation and irrevocably commits the goods to exportation, the constitutional prohibition against the state tax applies.

While appellee asserts (AB 13) that the passing of title did not make the tax applicable, but was "a mere happenstance," it will be observed that the Sales Tax Act of California made the tax applicable upon either delivery of the goods within the state or the passing of title. Appellee does not deny that under the law of this state, as in most jurisdictions, delivery to a common carrier would have passed title to the purchaser. Under its regulatory rule No. 26, no tax would be levied if the goods were delivered within this state to the purchaser's

"broker or forwarding agent for shipment outside this State" (App. AB 51). Such delivery certainly would pass both title and possession.

Indeed, we submit that appellee's Rule 26 is wholly inconsistent with its present position.

"Sales Tax Rule No. 26

Interstate and Foreign Commerce

The California retail sales tax does not apply to gross receipts from sales made in interstate or foreign commerce.

Exempt Transactions"

Three examples are then given where the sale is exempt, the third being:

"(3) delivery by the retailer *to a custom's broker or forwarding agent for shipment outside this State."* (AB p. 51.)

This clearly shows that appellee itself has never considered the passage of title and possession within this state as making the sales tax applicable where the delivery and passage of title are under such conditions as to insure transportation of the goods beyond the state. No reason suggests itself why the "Nucula" was not a forwarding agent within the meaning of the rule. Certainly no reason is apparent why delivery to the "Nucula" was not at least as adequate to carry the goods out of the state as would be delivery to a customer's broker or forwarding agent.

III.

Appellee Advances Neither Reason nor Authority to Sustain the Third Ground of the Majority Decision of the Court Below That the Tax Can Be Sustained as a License Tax for the Privilege of Doing Business Within the State.

Appellee's answer to our third point can be disposed of briefly. Its argument that the tax can be sustained as a privilege tax is predicated upon its theory that the export clause does not prohibit a state from imposing non-discriminatory taxes upon exports or imports.

On pages 16 and 17 appellee says:

> "If goods are taxed *as* exports or *because of* their intended exportation; or if the process of exportation itself is taxed there would be a violation of Article I, Section 10, Clause 2." (Emphasis appellee's.)

We are unable to perceive any practical difference between the right of the state to tax goods in the process of exportation and to tax the privilege of exporting. Certainly, if there is a difference, it is not one of substance.

As shown in our opening brief, in *Brown v. Maryland*, 12 Wheat. 419, 439, 444, Chief Justice Marshall pointed out specifically that all must concede a tax upon the right to sell was, in fact, a tax on the thing sold, that the state had a right to tax local transactions because there was no constitutional prohibition against it, but that it could not tax the privilege of selling imported goods because that was contrary to the Constitution.

In *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294, this Court in answering the contention that a tax

on the gross receipts from export sales could be sustained as a privilege tax for doing business in the state, said:

> "As in other cases of this character, we accept the decision of the state court of last resort respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts."
>
> *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294.

See, also, to the same effect:

Henderson v. Mayor, 92 U. S. 259, 268;

Galveston etc. Railway Co. v. Texas, 210 U. S. 217, 227;

Kansas City v. Bothin, 240 U. S. 227, 231;

St. Louis etc. Railway Co. v. Arkansas, 235 U. S. 350, 362.

In the last case cited, it is said:

> "Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."
>
> *St. Louis etc. Railway Co. v. Arkansas*, 235 U. S. 350, 362.

Conclusion.

We respectfully but confidently submit that the transaction involved in the instant case was an exportation of oil. That was what the parties contracted for, what they contemplated, and everything they did a necessary and incidental part of and step in its exportation. A tax upon any incident of that export is clearly forbidden by the Federal Constitution, and the judgment of the court below sustaining the tax as not in contravention of the Constitution, we submit, should be reversed.

All of which is respectfully submitted.

NORMAN S. STERRY,
ROBERT E. PARADISE,
Counsel for Appellant.

GIBSON, DUNN & CRUTCHER,
LLOYD & PARADISE,
Of Counsel.

APPENDIX "A."

Madison, Journal of Constitutional Convention (Scott's Ed., 1894), vol. 2, pp. 717-719.

"The clause relating to exports being reconsidered, at the instance of Colonel Mason,—who urged that the restrictions on the States would prevent the incidental duties necessary for the inspection and safe keeping of their produce, and be ruinous to the staple States, as he called the five Southern States,—he moved as follows: 'provided, nothing herein contained shall be construed to restrain any State from laying duties upon exports for the sole purpose of defraying the charges of inspecting, packing, storing and indemnifying the losses in keeping the commodities in the care of public officers, before exportation.' In answer to a remark which he anticipated, to-wit, that the States could provide for these expenses, by a tax in some other way, he stated the inconvenience of requiring the planters to pay a tax before the actual delivery for exportation.

Mr. Madison seconded the motion. It would at least be harmless; and might have the good effect of restraining the States to *bona fide* duties for the purpose, as well as of authorizing explicitly such duties; though perhaps the best guard against an abuse of the power of the States on this subject was the right in the General Government to regulate trade between State and State.

Mr. Gouverneur Morris saw no objection to the motion. He did not consider the dollar per hogshead laid on tobacco in Virginia, as a duty on exportation, as no drawback would be allowed on tobacco taken out of the warehouse for internal consumption.

Mr. Dayton was afraid the proviso would enable Pennsylvania to tax New Jersey under the idea of inspection duties of which Pennsylvania would judge.

Mr. Gorham and Mr. Langdon thought there would be no security, if the proviso should be agreed to, for the States exporting through other States, against these oppressions of the latter. How was redress to be obtained, in case duties should be laid beyond the purpose expressed?

Mr. Madison. There will be the same security, as in other cases. The jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States. His own opinion was, that this was insufficient. A negative on the State laws alone could meet all the shapes which these could assume. But this had been overruled.

Mr. Fitzsimons. Incidental duties on tobacco and flour never have been, and never can be, considered as duties on exports.

Mr. Dickinson. Nothing will save the States in the situation of New Hampshire, New Jersey, Delaware, &c., from being oppressed by their neighbours, but requiring the assent of Congress to inspection duties. He moved that this assent should accordingly be required.

Mr. Butler seconded the motion.

Adjourned."

Madison, Journal of Constitutional Convention (Scott's Ed., 1894), vol. 2, pp. 717-719.

APPENDIX "B."

Elliot, Debates on the Federal Constitution (Lippincott, 1907), vol. 3, pp. 481-483.

"Mr. George Mason. Mr. Chairman, if gentlemen attend to this clause, they will see we cannot make any inspection law but what is subject to the control and revision of Congress. Hence gentlemen who know nothing of the business will make rules concerning it which may be detrimental to our interests. For forty years we have had laid duties on tobacco, to defray the expenses of the inspection, and to raise an incidental revenue for the state. Under this clause, that incidental *revenue* which is calculated to pay for the inspection, and to defray contingent charges, is to be put into the federal treasury. But if any tobacco-house is burnt, we cannot make up the loss. I conceive this to be unjust and unreasonable. When any profit arises from it, it goes into the federal treasury. But when there is any loss or deficiency from damage, it cannot be made up. Congress are to make regulations for our tobacco. Are men, in the states where no tobacco is made, proper judges of this business? They may perhaps judge as well, but surely no better than our own immediate legislature, who are accustomed and familiar with this business. This is one of the most wanton powers of the general government. I would concede any power that was essentially necessary for the interests of the Union; but this, instead of being necessary, will be extremely oppressive.

Mr. George Nicholas. Mr. Chairman, I consider this clause as a good regulation. It will be agreed to that they will impose duties in the most impartial manner, and not throw the burdens on a part of the community. Every man who is acquainted with our laws must know that the duties on tobacco were as high as sixteen shillings a hogshead. The consequence was, that the tobacco-makers have paid upwards of twenty thousand pounds, annually, more than the other citizens; because they paid every other kind of tax, as well as the rest of the community. We have every reason to believe that this clause will prevent injustice and partiality. Tobacco-makers will be benefited by it. But the gentleman says that our tobacco regulations will be subject to the control of Congress, who will be unacquainted with the subject. The clause says that all such laws shall be subject to the revision and control of Congress. What laws are meant by this? It means laws imposing duties on the exports of tobacco. But it does not follow that laws made for the regulation of the inspectoin shall be subject to the revision of Congress. He may say that the laws for imposing duties on the exports of tobacco, and laws regulating the inspection, must be blended in the same acts. Give me leave to say that they need not be so; for the duties on exports might be in one law, and the regulation of the inspection in another. The states may easily make them separately. But, he says, we shall lose the profit. We shall, then, find equity in our legislature which we have not found heretofore; for, as they will lay it not for their own exclusive advantages, but partly for the benefit

of others, they will not be interested in laying it partially. As to the effect of warehouses being burnt, I differ from him. A tax may be laid to make up this loss. Though the amount of the duties go into the federal treasury, yet a tax may be laid for that purpose. Is it not necessary and just, if the inspection law obliges the planter to carry his tobacco to a certain place, that he should receive a compensation for the loss, if it be destroyed? The legislature must defray the expenses and contingent charges by laying a tax for that purpose; for such a tax is not prohibited. The net amounts only go into the federal treasury after paying the expenses. Gentlemen must be pleased with this par., especially those who are tobacco-makers.

Mr. George Mason replied, that the state legislatures could make no law but what would come within the general control given to Congress; and that the regulation of the inspection, and the imposition of duties, must be inseparably blended together.

Mr. Madison. Mr. Chairman, let us take a view of the relative situation of the states. Some states export the produce of other states. Virginia exports the produce of North Carolina; Pennsylvania, that of New Jersey and Delaware; and Rhode Island, that of Connecticut and Massachusetts. The exporting states wished to retain the power of laying duties on exports, to enable them to pay the expenses incurred. The states whose produce is exported by other states were extremely jealous, lest a contribution should be raised of them by the exporting

states, by laying heavy duties on their commodities. If this clause be fully considered, it will be found to be more consistent with justice and equity than any other practicable mode; for, if the states had the exclusive imposition of duties on exports, they might raise a heavy contribution from other states, for their own exclusive emolument. The honorable member who spoke in defence of the clause has fairly represented it. As to the reimbursement of the loss that may be sustained by individuals, a tax may be laid on tobacco, when brought to the warehouses, for that purpose. The sum arising therefrom may be appropriated to it consistently with the clause; for it only says that "the *net* produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States," which necessarily implies that all contingent charges shall have been previously paid."

Elliot, Debates on the Federal Constitution (Lippincott, 1907), vol. 3, pp. 481-483.

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 18 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 864

RICHFIELD OIL CORPORATION, A CORPORATION,
Appellant

vs.

STATE BOARD OF EQUALIZATION,
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION

ROBERT W. KENNY,
Attorney General of the
State of California,
Counsel for Appellee.

JOHN L. NOURSE,
Deputy Attorney General of
the State of California,
Of Counsel.

INDEX

Subject Index.

	Page
Statement opposing jurisdiction	1
The judgment of the State Court is not final	1
The case does not involve the validity of a state statute	2
The federal question involved is unsubstantial	4
Conclusion	7

Table of Cases Cited.

A. G. Spalding & Bro. v. *Edwards, Collector of Internal Revenue*, 262 U. S. 66	6
American Manufacturing Co. v. *City of St. Louis*, 250 U. S. 459	7
Bacon & Sons v. *Martin, Commissioner of Revenue*, 302 U. S. 642	2
Brown v. *Houston*, 114 U. S. 622	7
Central Savings Bank of Oakland v. *Lake*, 201 Cal. 438, 257 Pac. 521	1
Crescent Creamery, Inc. v. *Milk Control Board*, 305 U. S. 559	2
Crew Levick Co. v. *Commonwealth of Pennsylvania*, 245 U. S. 292	6
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282	4
Dept. of Treasury of Indiana v. *Wood Preserving Corp.*, 313 U. S. 62	4
Erlin v. *National Union Fire Ins. Co.*, 7 Cal. (2d) 547, 61 Pac. (2d) 756	1
Frazie v. *Orleans Dredging Co.*, 296 U. S. 653	2
Hooven & Allison Co. v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870, 89 L. Ed. 852	6
International Harvester Co. v. *Department of Treasury*, 322 U. S. 340	4
Monson v. *Fischer*, 219 Cal. 290, 26 Pac. (2d) 6	1

Page

R. J. Reynolds Tobacco Co. v. *Robertson, Collector of Internal Revenue*, 94 F. (2d) 167, 304 U. S. 563 7
Schlosser v. *Hemphill*, 198 U. S. 173 2
Superior Oil Co. v. *State of Mississippi*, 280 U. S. 390 4
Western Lithograph Co. v. *State Board of Equalization*, 11 Cal. (2d) 156, 78 Pac. (2d) 731, 117 A. L. R. 838 3

STATUTES CITED

California Retail Sales Tax Act of 1933 (Stats. 1933, pp. 2599, 2601) 2, 3, 7
Constitution of the United States:
Article I, Section 9, Clause 5 6
Article I, Section 10, Clause 2 6
Boskey "Finality of State Court Judgments under the Federal Judicial Code," 43 Col. Law. Rev. 1002, 1015 2
Revenue and Taxation Code, Secs. 6351, 6352 (enacted 1941) 3
Robertson & Kirkham "The Jurisdiction of the Supreme Court of the United States" p. 50, et seq. 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 864

RICHFIELD OIL CORPORATION, A CORPORATION,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee

STATEMENT OPPOSING JURISDICTION

The Judgment of the State Court Is Not Final

The California Supreme Court reversed the judgment of the trial court and gave no directions with respect to the disposition of the case by the lower court. The effect of this order was to return the case for a new trial.

Central Savings Bank of Oakland v. *Lake*, 201 Cal. 438, 443 (257 Pac. 521);
Monson v. *Fischer*, 219 Cal. 290, 291 (26 Pac. 2d 6);
Erlin v. *National Union Fire Ins. Company*, 7 Cal. 2d 547, 549 (61 Pac. 2d 756).

In the *Erlin* case the California Supreme Court said: "The reversal of the judgment was unqualified, that is to say, without direction to the trial court. Such a reversal

remands the case for a new trial and places the parties in the same position as if the case had never been tried."

Under the California practice appellant could, with the permission of the court, amend its complaint and it could produce other and further evidence in support of its contentions. Similarly, upon a new trial the trial court would have the power to make other and different findings of fact.

We are unable to conceive of any evidence which appellant could produce which would change the result. We believe that, acting under the compulsion of the doctrine of the law of the case, the trial court could do nothing except to enter judgment for appellee. We do not desire to delay a final determination of the cause upon the merits. But we can find no support in the decisions of this Court for the proposition that this judgment is final.

The trial court would act judicially, not ministerially, in entering a judgment for appellee and therefore the judgment is not final.

Schlosser v. *Hemphill*, 198 U. S. 173, 175;
Frazie v. *Orleans Dredging Co.*, 296 U. S. 653;
Bacon & Sons v. *Martin, Commissioner of Revenue*, 302 U. S. 642;
Crescent Creamery, Inc. v. *Milk Control Board*, 305 U. S. 559.

See also: Robertson and Kirkham: "The Jurisdiction of the Supreme Court of the United States," p. 50 *et seq.*

Boskey: "Finality of State Court Judgments Under the Federal Judicial Code," 43 Col. Law. Rev. 1002, 1015.

The Case Does Not Involve the Validity of a State Statute

The California Retail Sales Tax Act of 1933 (Stats. 1933, p. 2599) is a privilege tax levied upon retailers for the

privilege of engaging in business as retailers. The tax is measured by gross receipts from sales at retail.

Western Lithograph Company v. *State Board of Equalization*, 11 Cal. 2d 156, 64; 78 Pac. 2d 731; 117 A. L. R. 838.

The act by its own terms excludes from the measure of the tax the receipts of sales which the State is prohibited from taxing by the Constitution or laws of the United States. In 1937, when the sale in question was made, the applicable portion of the statute read as follows:

> "There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act the following:
>
> "(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

(Retail Sales Tax Act Sec. 5; Stats. 1933, p. 2601.)[1]

While the validity of the statute was formally challenged by the pleadings, the point was not pressed in the briefs and neither the trial court nor the California Supreme Court referred to the validity of the statute in its opinion. A tax statute cannot be contrary to the Constitution when it specifically exempts from the measure of the tax those receipts from sales which the State is forbidden to tax by the Constitution. In this case the legislative mandate is clear. If the appellee exacted a tax from appellant in violation of its constitutional rights, it did so without legislative authorization or sanction.

---

[1] Substantially the same provisions will be found in the Revenue and Taxation Code, Secs. 6351, 6352 (enacted 1941).

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282 is not in point. The Kentucky statute challenged in that case contained no provision such as Section 5 of the California Retail Sales Tax Act.

The Federal Question Involved Is Unsubstantial

The taxpayer sold fuel oil and other petroleum products in California. This appeal involves a tax upon a sale of a single cargo of fuel oil to the government of New Zealand. The sale was consummated by delivery in the State of California.

This Court has thrice held that the delivery of merchandise to a purchaser within the borders of a State is a local event which is taxable even if the purchaser thereafter removes the goods from the State.

Superior Oil Company v. *State of Mississippi*, 280 U. S. 390;

Dept. of Treasury of Indiana v. *Wood Preserving Corporation*, 313 U. S. 62;

International Harvester Co. v. *Department of Treasury*, 322 U. S. 340.

In the *Superior Oil* case the vendees were fishermen. They took the gasoline which they had purchased from the taxpayer out of the State on fishing boats and apparently consumed it while cruising in the Gulf of Mexico.

In the *Wood Preserving* case, the vendee was the Baltimore & Ohio Railroad. It purchased ties from the taxpayer which it transported over its own lines to a point in Ohio.

In the *International Harvester* case (Class "D" sales), the vendees were residents of Illinois who purchased trucks and farm equipment from the taxpayer. The trucks probably left the taxing state under their own power and the

farm implements were towed or carried in trucks across the State line.

There is no substantial basis for an argument that the activities of any of these local taxpayers would be viewed in a different light if the vendee had taken the merchandise across an international border. If the Superior Oil Co. had sold gasoline to Mexican fishermen at the docks in Biloxi, the transaction still would have been a local one. The nature of the Indiana transaction between the Wood Preserving Co. and the Baltimore & Ohio Railroad would not have been changed if the railroad had taken the ties to Ontario instead of Ohio. The sale of a truck to the Canadian Government would be a local Indiana transaction if Canada sent its employee to Indiana to accept delivery.

If the oil in question had been delivered to an American Naval Tanker for transport to Bremerton or Newport the power of the State to tax the local sale could not have been questioned. The transaction which California is now attempting to tax is likewise a local transaction. It is a transaction which the State can tax without burdening commerce, interstate or foreign.[2] It is a transaction which is not part of the commerce and it follows that it is not part of an export.

Appellant argues that to hold otherwise would destroy the effectiveness of the export-import clause. The decision in the *Wood Preserving* case did not destroy the effectiveness of the commerce clause for transactions of the character involved here are comparatively rare. The bulk of this country's exports move through normal channels of trade.

---

[2] In the State courts appellant relied upon both the commerce clause and the export-import clause. It has abandoned its commerce clause contentions in this Court. Obviously, a tax which does not burden interstate commerce does not burden foreign commerce.

A foreign consumer seldom comes to this country with his own ship for the purpose of acquiring goods.

Appellant argues that the power to tax exports is not coextensive with the power to tax interstate commerce transactions. It is true, however, that any tax levied upon an export would be a burden on commerce. If, as appellant now concedes, this tax does not burden commerce, it cannot be classed as a tax on an export.

This Court has held that an "impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms."

Crew Levick Co. v. *Commonwealth of Pennsylvania*, 245 U. S. 292, 295.

This Court has never applied Article I, Section 10, Clause 2 of the Constitution to strike down a State tax on exports where the commerce clause was not also applicable.[3]

As appellant has pointed out, the California Retail Sales Tax is levied upon retailers for the privilege of doing business at retail and it is measured by gross receipts from sales at retail. It is, therefore, unlike the tax involved in *A. G. Spalding & Bros.* v. *Edwards, Collector of Internal Revenue*, 262 U. S. 66. The tax involved there was an excise upon the goods measured by the selling price but it was described by the court as a tax upon the sale itself. In that case there was a delivery to a common carrier. Thus the *Spalding* case is distinguishable on several grounds. It involved a different kind of transaction, a different constitutional provision (Article 1, Section 9, Clause 5) and a different kind of tax.

If California had chosen to tax the privilege of manufac-

[3] In the case of imports an exception has been made in applying the original package doctrine (*Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652; 65 S. Ct. 870, 89 L. Ed. (Adv.) 852.

turing and had attempted to measure the tax by gross sales, the tax would have been valid. See:

American Manufacturing Company v. *City of St. Louis*, 250 U. S. 459;

R. J. Reynolds Tobacco Co. v. *Robertson, Collector of Internal Revenue*, 94 Fed. 2d 167 (cert. denied, 304 U. S. 563).

California has elected to tax the privilege of selling at retail. Only receipts from sales to a consumer are included in the measure of the tax. Only sales which are consummated by delivery within the State are considered. The tax could have no more effect on the price of goods exported than a tax on the privilege of manufacturing and, like that tax, it is directed at the exercise of a purely local privilege. The tax is imposed only when both the seller and the buyer are in the States. It is not calculated to burden exports or imports and it does not have that effect.

In *Brown* v. *Houston*, 114 U. S. 622, 629, the court said:

> "A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine."

The California tax is not, then, a duty or impost on exports.

Conclusion

California oil companies have sold petroleum products to various foreign purchasers. Excluding sales where the California vendor made delivery in its own tankers and excluding sales where delivery was made by common carrier, taxes aggregating more than $1,700,000 have been

assessed on sales of this character by appellee. In addition, interest has accrued thereon in a considerable amount.

Measured in dollars and cents, the case is therefore important. It is submitted, however, that the issues are conclusively determined by the decisions herein cited and that the Federal question raised is unsubstantial.

Dated: Sacramento, California, February 1, 1946.

Respectfully submitted,

ROBERT W. KENNY,
Attorney General of
the State of California,
Counsel for Appellee.

JOHN L. NOURSE,
Deputy Attorney General of
the State of California,
Of Counsel.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 46

RICHFIELD OIL CORPORATION,
a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee.

APPELLEE'S BRIEF

ROBERT W. KENNY,
Attorney General of the
State of California,

JOHN L. NOURSE,
Deputy Attorney General of the
State of California,
Counsel for Appellee.

42960 PRINTED IN CALIFORNIA STATE PRINTING OFFICE

INDEX

	Page
STATEMENT OF THE CASE	1
THE APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. The Commerce Clause Does Not Prevent the Levy of the Tax	6
II. Sales Consummated Within the Borders of the Seller's State Should be Subject to Local Taxation Whether the Goods Thereafter Move in Interstate or Foreign Commerce	9
III. A Non-discriminatory Tax on a Local Sale is Neither a Duty nor an Impost on Exports Even if the Purchaser Exports the Goods	15
IV. The Constitutional Convention	18
V. Cases Dealing With the Taxation of Exports by the States	20
VI. Cases Involving the Taxation of Exports by the United States and Their Relation to the Commerce Clause Cases	25
VII. Cases Involving the Taxation of Imports by the States	33
CONCLUSION	39

TABLE OF AUTHORITIES CITED

CASES

	Page
Adams Manufacturing Co. v. Storen, 304 U.S. 307	10, 17, 23
Almy v. California, 24 How. 169	20
American Manufacturing Co. v. St. Louis, 250 U.S. 459	27
Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218, 238	34, 36
Austin v. Tennessee, 179 U.S. 343	33
Bacon v. Illinois, 227 U.S. 504	29
Banker Brothers v. Pennsylvania, 222 U.S. 210	29
Blount v. Munroe (1878), 60 Ga. 61, 68	24
Brown v. Houston, 114 U.S. 622, 629	21, 24
Brown v. Maryland, 12 Wheat. 419	33
Burke v. Wells, 208 U.S. 14	33
Carson Petroleum Co. v. Vial, 279 U.S. 95, 166-168	30
Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366	30
Clark v. Williard, 292 U.S. 112	3
Clarke v. Clarke (1877), 3 Woods 408, Fed. Case No. 2846	24
Coe v. Errol, 116 U.S. 517	10, 16, 21, 24, 38
Cook v. Pennsylvania, 97 U.S. 566	34, 36
Cornell v. Coyne, 192 U.S. 418	27
Crew Levick v. Pennsylvania, 245 U.S. 292	10, 17, 21, 23
De Aryan v. Akers, 12 Cal. 2d 781; 87 Pac. 2d 695	15
Department of Treasury v. Wood Preserving Corp., 313 U.S. 62	6, 33
Fairbank v. United States, 181 U.S. 283	21, 26
Felt and Tarrant Manufacturing Co. v. Gallagher, 306 U.S. 62	16
Gulf Fisheries v. MacInerney, 276 U.S. 124	33
Hooven & Allison Co. v. Evatt, 324 U.S. 652	14, 33, 37
Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469	30
International Harvester Co. v. Department of Treasury, 322 U.S. 340	6
Joseph v. Carter & Weekes Stevedoring Co. No. 29, October, 1946, term	33
Krauter v. Menchacattorre, 195 N.Y.S. 361, 363	38
Low v. Austin, 13 Wall. 29	14, 33
May v. New Orleans, 178 U.S. 496	33
Minnesota v. Blasius, 290 U.S. 1, 8	38

Page

Morrison-Knudson Co. v. State Board of Equalization, 58 Wyo. 500; 135 Pac. 2d 927, 933 11
McGoldrick v. Berwind-White Coal Mining Company, 309 U.S. 33, 46 13
McLeod v. Dilworth, 322 U.S. 327 11
National Ice & Cold Storage Co. v. Pacific Fruit Express Co., 11 Cal. 2d 283; 79 Pac. 2d 380 15
Puget Sound Stevedoring Co. v. Tax Commission, 302 U.S. 90 32
Railroad Commission of Louisiana v. Texas & Pacific Ry. Co., 229 U.S. 336 ..... 27, 29
Robbins v. Shelby County, 120 U.S. 489 26
Sonnenborn Bros. v. Curetop, 262 U.S. 506 36
Spalding Bros., A. G. v. Edwards, 280 U.S. 66 ..... 10, 12, 27, 31
Superior Oil Co. v. Mississippi, 280 U.S. 390 ..... 6, 28, 31
Susquehanna Coal Co. v. South Amboy, 228 U.S. 665 29
Texas & New Orleans R. R. Co. v. Sabine Tram Company, 227 U.S. 111 ..... 27, 29
Thames and Mersey Ins. Co. v. United States, 237 U.S. 19 26
Turpin v. Burgess, 117 U.S. 504 25
United States v. Hvoslef, 237 U.S. 1 26
Waring v. The Mayor, 8 Wall. 110 ..... 33, 38
Welton v. Missouri, 91 U.S. 275 34
Western Lithograph Co. v. State Board of Equalization, 11 Cal. 2d 156; 78 Pac. 2d 731; 117 A. L. R. 838 15
Western Livestock v. Bureau of Revenue, 303 U.S. 250 33
Woodruff v. Parham, 8 Wall. 123 ..... 18, 20

STATUTES

California Retail Sales Tax Act, Sec. 2b 16
California Retail Sales Tax Act, Sec. 8½ 15
California Retail Sales Tax Act, Sec. 21 2

MISCELLANEOUS

Sales Tax Rules and Regulations No. 26 ..... 10, 16

TEXTBOOKS

12 Wheat. 419, 442 36
38 Harv. L. R. 858 37
A Constitutional Source of National Revenue Impaired, 29 Harv. L. R. 469 26
Farrand: The Record of the Federal Convention 18
The Federalist No. 42 18

In the Supreme Court
of the
UNITED STATES

OCTOBER TERM, 1946

No. 46

RICHFIELD OIL CORPORATION,
a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee.

STATEMENT OF THE CASE

The statement of the case contained in Appellant's Brief is accurate, but the essential facts are stated here for convenience.

Under date of February 4, 1937, the Appellant entered into a contract for the sale of two cargoes of fuel oil to the Government of New Zealand. The contract called for delivery to the New Zealand naval tanker "*Nucula*" at Los Angeles. Delivery of the second cargo was made pursuant to the contract at Los Angeles on May 14, 1937. On May 15, 1937, the *Nucula* sailed for Aukland, New Zealand.

On September 25, 1940, a notice of assessment covering sales made during the period from April 1,

1937, to March 31, 1940, was issued to the taxpayer. The receipts from the sale of the second cargo were included in the assessment along with other items, but the receipts from the sale of the first cargo were omitted since delivery, which was made on March 15, 1937, preceded the period covered by the assessment.*

In due course the Appellant paid the tax on the receipts from this sale and filed a claim for refund. Upon denial of its claim it filed suit to recover the sum in the California Superior Court. The case was tried upon a stipulation of facts and judgment was entered for the taxpayer. The State appealed and the judgment was affirmed (155 Pac. 2d 1). A rehearing was granted and the judgment was reversed. (27 Adv. Cal. 150; 163 Pac. 2d 1.)

It was the view of the Trial Court that the tax was a burden on commerce and a duty on exports. In its first opinion the California Supreme Court relied upon the export-import clause alone. In reversing the judgment the Supreme Court held that the State was not precluded from taxing the transaction by either clause.

In its assignments of error, Appellant relies only upon the export-import clause.

* Apparently the assessment on the first cargo was barred by the Statute of Limitations before the facts were discovered: Retail Sales Tax Act, Section 21; Revenue and Taxation Code, Section 6487.

THE APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION

The tax involved in this case was assessed upon a transaction substantially identical with other transactions involving Appellant or other oil companies as the seller and the Government of New Zealand or other governments as the purchaser. The taxes involved in the other cases, including interest and penalties, now aggregate approximately $2,500,000.

The State is, therefore, satisfied that if this appeal were dismissed without a determination on the merits either Appellant or one of its competitors would eventually bring the questions of constitutional law involved before the Court in this or some similar proceeding. The sale involved in this case occurred in May, 1937, and the State could hardly gain by any further delay. Accordingly, we desire to have an immediate determination on the merits and have raised the jurisdictional question only because we conceive it to be our duty to do so.

In *Clark* v. *Williard*, 292 U.S. 112, the judgment was reversed "for further proceedings in accordance with the opinion." The judgment of the California Supreme Court contained no such direction.

It is true that if the case were returned to the Trial Court it should grant a motion for judgment on the pleadings, and it is also true that, in view of the concessions contained in Appellant's Brief that it

would undoubtedly do so. But it would nevertheless be acting judicially in doing so.

The Trial Court would not be acting under the compulsion of a direction of the California Supreme Court in granting such a motion. It would merely be applying the doctrine of the law of the case—a legal principle which, like the doctrine of *stare decisis*, is sometimes applied with reservations.

Appellant cites no case which holds that a judgment of a state court is final when it merely remands a case for a new trial even though an examination of the record shows that it is unlikely that the case could be finally determined upon non-federal grounds. We are not prepared to state that there is an independent ground upon which the cause might be determined, but we do not understand that the jurisdiction of this Court depends upon whether or not independent points could be raised upon a new trial.

If such were the rule this Court would be compelled to examine the record in each case and determine for itself whether under local rules of pleading and practice there is a reasonable prospect that the case might be disposed of upon non-federal grounds. We assume that it is for this reason that the Court has thus far declined to assume jurisdiction of an appeal where a reversal by a state appellate court merely served to open the way for further judicial action by a trial court.

SUMMARY OF THE ARGUMENT

It is established that a tax upon a retail sale consummated by delivery within the borders of the seller's State does not burden commerce. The same rule applies to exports.

The proposition that a nondiscriminatory tax on such a local sale or upon the privilege of selling at retail is no more a duty on exports than it is a burden on commerce is supported by the debates in the Constitutional Convention and by the decisions of this Court. The contrary argument is based on an attempted analogy to cases applying the original package doctrine to imports. That doctrine is artificial; no similar artificial doctrine has ever been applied to exports and there is no sound reason why it should be.

Appellant's attempt to establish that the export had begun prior to the delivery and that the sale was an export sale rests upon decisions dealing with the power of the Federal Government to regulate commerce rather than with the power of the States to levy taxes on local events which are closely related to commerce. The cases dealing with the taxation of sales hold that sales of the character of the sale involved here are local and these cases are controlling.

ARGUMENT

I. The Commerce Clause Does Not Prevent the Levy of the Tax

The taxpayer does not rely upon the commerce clause in this Court.[1] Apparently, therefore, it accepts the proposition that the commerce clause does not preclude the taxation of a transaction consummated by delivery within the borders of a State in which the seller does business, even if the goods are thereafter moved in foreign commerce.

The transaction involved in the case at bar is essentially the same as those involved in *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390; *Department of Treasury* v. *Wood Preserving Co.*, 313 U.S. 62; and *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340 (Class "D" sales), and it is apparent that these cases are controlling, at least as respects the application of the commerce clause.

In the *Superior Oil* case oil was delivered to the purchaser on the docks at Biloxi, Mississippi, but it was consigned to the purchaser at a point in Louisiana and was immediately loaded on the purchaser's vessels and taken out of the harbor.

In the *Wood Preserving* case railroad ties were loaded on freight cars belonging to the purchaser and

[1] The Trial Court concluded that the tax was invalid under the commerce clause as well as under the export-import clause (R.p.65). Appellant raised the point in its claim for refund (R.p.15) and in its complaint (R.p.9). It continued to press the point in its briefs in the California Supreme Court and it was discussed in that court's opinion (R.pp.87,97). However, the assignments of error are limited to the application of the export-import clause.

were immediately shipped out of Indiana to Ohio for processing in the seller's plant.

In the *International Harvester* case (Class "D" sales) residents of Illinois came into the State of Indiana and took delivery of trucks which they immediately drove to Illinois for use there.

In each of the three cases the Court held that the sale was a local sale; that it was not an interstate sale at all and that the tax did not burden interstate commerce. Appellant, although not relying upon the commerce clause, attempts to distinguish these cases on their facts.

It emphasizes the fact that in the case at bar the contract contemplated that the purchaser would remove the oil from the State and that the oil was actually exported. But in each of the cases cited there was also such a contract and the goods were later removed from the State. Appellant also points to the fact that in the case at bar delivery was accomplished by loading the oil on the purchaser's vessel, but it will be seen that the *Wood Preserving* case differs only in that delivery was accomplished by loading the ties on the purchaser's railroad cars.

It is also argued that in the case at bar it was certain that the oil would be transported without the State of California and it is inferred that this was not so in the cases cited. Actually there was no more likelihood that the ties sold by the Wood Preserving Company would be diverted to a point in Indiana than there was that the oil sold to the Government of

New Zealand would be transhipped to another vessel in Los Angeles Harbor or at sea or that it would be diverted to San Diego or San Francisco. The Wood Preserving Company might have had a cause of action against the Baltimore and Ohio Railroad if it had diverted the ties, for the contract contemplated that the ties would be returned to it in Ohio for treatment, but Appellant would have had no ground for complaint if the Government of New Zealand had diverted the oil. It lost all interest in the oil when it loaded it on the "*Nucula.*" From that point on it was interested only in receiving payment of the purchase price.

In the last analysis, therefore, Appellant's argument is reduced to the proposition that this transaction is not taxable, although the State would have been free to tax a similar sale of fuel oil if it had been delivered to a tanker owned by the purchaser for transportation to Seattle or New York.

Furthermore, Appellant apparently would contend that a different result would have been reached in the *Wood Preserving Co.* case if the ties had been purchased by a Canadian railway which took the ties to Ontario for treatment; that the *International Harvester Company* case would have been decided differently if the trucks had been driven to Canada instead of Illinois and that a different result would have been reached in the *Superior Oil* case if the purchasers had been Mexican fishermen and if the oil had been consigned to a Mexican port.

This Court has held that the sales involved in those cases were local sales. Appellant argues that the sale involved in the case at bar was an export sale. It asks the Court to hold, therefore, that a sale made in California is local (and not interstate) if the purchaser takes the goods to Vancouver, Washington, and that an identical transaction is foreign (and not local) if the purchaser takes the goods to Vancouver, British Columbia.

The power of the State to tax is measured by what is done within its borders. It is not affected by what the purchaser thereafter does with goods which he has purchased locally.

II. Sales Consummated Within the Borders of the Seller's State Should Be Subject to Local Taxation Whether the Goods Thereafter Move in Interstate or Foreign Commerce

The rule that a sale consummated by delivery in the State in which the seller is located is subject to taxation by the seller's State rests upon sound policy. In the case of interstate commerce, there is no danger that the sale itself would be subjected to a second tax by the State in which the buyer uses the property. It is equally clear that any other rule would cause serious difficulties in the administration of local sales taxes. If a tourist buying jewelry were exempt from taxes on purchases which he made while visiting in a State, local residents might claim to be tourists. The same administrative difficulties would be encountered

if out-of-state businessmen were free to send their trucks, or railroad cars or ships into the State to take possession of goods purchased from local vendors.

There are also important differences from the legal standpoint. Both buyer and the seller are within the jurisdiction of the taxing State. And the delivery is accomplished in exactly the same manner as it is in a transaction in which the ~~taxpayer~~ purchaser intends to retain the goods in the taxing State after he has accepted delivery.

A further practical consideration is that the great bulk of goods are moved across state lines by common carrier and that therefore, a tax on sales consummated by actual delivery within the State will not affect the great flow of commerce.

For these reasons the California State Board of Equalization has insisted upon the right of the State to tax sales consummated by delivery to the purchaser within the State, whether the purchaser intended to take the goods out of the country or merely across a State line. But the Board has made no attempt to reach sales where the delivery was made to a common carrier or forwarding agent within the State.[2] No distinction has been made between sales in interstate commerce and sales in foreign commerce.

The administrative ruling exempting sales where delivery made is to common carrier is based upon the theory that the Constitution precludes the taxation of such sales.[3] The California Sales Tax Law itself

[2] Sales Tax Rules and Regulations No. 26 printed in appendix "B."

[3] See *Coe* v. *Errol*, 116 U.S. 517.; *Crew-Levick* v. *Pennsylvania*, 245 U.S. 292; *A. G. Spalding Bros.* v. *Edwards*, 262 U.S. 66; *Adams Manufacturing Co.* v. *Storer*, 304 U.S. 307.

makes transfer of title or possession the test and, as Appellant points out, the law would by its terms apply to sales where delivery was made to a common carrier. However the ruling has not been changed in spite of suggestions that *McLeod* v. *Dilworth*, 322 U.S. 327, opens the way to the taxation of such transactions.[4]

Appellant's suggestion that the decision of the California Supreme Court rests upon the sole ground that title passed in the State is therefore in error. There was a transfer of both title and possession in this case and the Court's decision goes no further than to hold that such a transaction is taxable.

The test which Appellant proposes is "certainty of export." The inherent uncertainties in such a test are demonstrated by Appellant's own inability to say upon which side of the line cases such as the *Wood Preserving* case would fall.

There are also sound practical objections to declaring that as a matter of constitutional law taxability depends upon the place where title passes under the law of sales.[5] These practical difficulties are avoided by applying the rule that sales consummated by delivery in the seller's State are subject to taxation even if the goods thereafter move in interstate or foreign commerce.

---

[4] But see *Morrison-Knudsen Co.* v. *State Board of Equalization*, 58 Wyo. 500; 135 Pac. 2d 927, 933.

[5] See the dissenting opinion of Mr. Justice Rutledge in *McLeod* v. *Dilworth*, supra, 322 U.S. 327, 349.

Appellant argues that the difference between delivery to a common carrier and delivery to the purchaser is not substantial, and that the export of the oil began with the loading of the ship. But this Court has already drawn the line. This Court has held that where the purchaser comes into the State to take delivery a tax on the sale is not a regulation of commerce,[6] but that where delivery is made to a carrier the tax is invalid.[7] In drawing the line it has also expressly noted that the two transactions are much alike, but it has concluded that the distinction is sufficient to require a difference in treatment.

Appellant also points out that the prohibition of the export-import clause is absolute and that there is no express prohibition on the taxation of interstate commerce. This argument involves the patently erroneous assumption that every tax which is a regulation of foreign commerce is necessarily a duty on imports or exports, and that there must be some export duties which do not constitute regulations of commerce.

It is contended that here the taxable event occurred after commerce had begun; that the export began with the movement of oil to the docks. But in its claim for refund, which Appellant concedes is binding upon it,[8] it stated that the oil was loaded onto the tanker on May 14, 1937, and that it "was thereafter duly exported on May 15, 1937 from Long Beach, Cali-

[6] *Superior Oil Co.* v. *Mississippi*, supra.
[7] *A. G. Spalding Bros.* v. *Edwards*, 262 U.S. 66.
[8] App. Op. Brief, pp. 9-10.

fornia to Auckland, New Zealand * * *." (R., p. 13.)

This is an accurate statement of what happened. The oil was exported by the purchaser the day after it was loaded upon its vessel.

Appellant also emphasizes the fact that in this case it loaded the oil on the vessel and argues that the process of loading was part of the process of exportation. While the record does not disclose the manner in which the oil was loaded, it appears likely that it flowed by gravity through pipes owned by the taxpayer into the purchaser's vessel. If this feature were important a different result would be reached if the materials sold were lifted from the dock by winches on the purchaser's vessel. This would be in substance saying that when the purchaser picks up the merchandise the sale can be taxed, but that it can not be taxed if the seller hands it to him. The most vulnerable point of the argument is that the thing taxed is the passage of title, not the loading of the vessel. The fact that title passes upon loading is a mere happenstance which can not effect the taxability of the transaction.

Finally, Appellant attempts to avoid the rule laid down in the commerce cases by stating that their real basis is that (as stated in *McGoldrick* v. *Berwind-White Coal Mining Company*, 309 U.S. 33, 46) "* * * it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of State tax burdens, merely

because an incidental or consequential effect of the tax is an increase in the cost of doing business."

The implication is that it was the purpose of the export-import clause to relieve those engaged in foreign commerce of their just share of State tax burdens merely because a tax increases the cost of doing business.

There are two cases in which the Court has, in effect, held that the original package doctrine does relieve a local taxpayer of his just share of local taxation.[9] But the basis of each of these decisions was that a property tax levied directly upon imported goods was a tax on imports and fell within the express prohibition of the Constitution. The taxes were not condemned merely because they increased the cost of doing business. Here the tax is levied upon the local privilege of selling tangible personal property at retail. Passage of title and delivery within the State determines whether the receipts from the sale shall be included in the measure of the tax. The tax incidentally increases the cost of doing a local business, but it does not affect the importation or exportation of merchandise in any other way, and it is not levied upon exportation or any part of the process.

[9] *Low* v. *Austin*, 13 Wall. 29; *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652. These cases are hereinafter discussed.

III. A Non-Discriminatory Tax on a Local Sale is Neither a Duty nor an Import on Exports Even if the Purchaser Exports the Goods

The California Sales Tax is imposed upon the privilege of conducting a retail business. The tax is measured by gross receipts from sales at retail. At the time of the sale Section 3 of the Retail Sales Tax Act [10] read in part as follows:

> "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the ~~sale~~ rate of . . . 3 per cent of the gross receipts of any such retailer from the sale of all such tangible personal property sold at retail in this State on and after July 1, 1935 * * *."

The California courts have repeatedly held that the tax is imposed upon the vendor and that a provision directing that the tax "shall be collected by the retailer from the consumer in so far as the same can be done" [11] merely directs the retailer to state the amount of the tax separately in quoting his price to the extent that he has the legal authority to do so.[12]

The act contains a number of exemptions none of which discriminate against goods of extra-state origin or against goods leaving the State in interstate or

[10] Stats. 1933, p. 2600, as amended by Stats. 1935, p. 1253. In 1943 the act was codified and the provision is now found in Revenue and Taxation Code, Section 6051.

[11] Retail Sales Tax Act, Section 8½, Stats. 1933, p. 2602; Revenue and Taxation Code, Sec. 6052.

[12] *National Ice & Cold Storage Co.* v. *Pacific Fruit Express Co.*, 11 Cal. 2d 283; 79 Pac. 2d 380. *Western Lithograph Co.* v. *State Board of Equalization*, 11 Cal. 2d 156; 78 Pac. 2d 731, 117 A. L. R. 838; *de Aryan* v. *Akers*, 12 Cal. 2d 781; 87 Pac. 2d 695.

foreign commerce. There is a complementary use tax [13] which was held constitutional by this Court in *Felt and Tarrant Manufacturing Co.* v. *Gallagher,* 306 U.S. 62.

As stated above, while a sale is defined to include "any transfer of title or possession or both,"[14] the State Board of Equalization has by regulation excluded from the measure of the tax the receipts from transactions where title passes upon delivery to a common carrier, custom broker, or forwarding agent.[15]

The tax, therefore, applies only to sales which are consummated by delivery to the purchaser within the State.

As applied to such transactions the tax is not a "duty or impost on exports" in the ordinary sense in which that term is used.

If goods are taxed *as* exports or *because of* their intended exportation; or if the process of exportation itself is taxed there would be a violation of Article I, Section 10, Clause 2. It would also follow, necessarily, that commerce would be improperly burdened (See *Coe* v. *Errol,* 116 U.S. 517, 525-526). Indeed, it would seem to be too clear for argument that a duty on exports imposed by a State would be precluded by the

[13] Stats. 1935, p. 1297. In codifying the Sales and Use Tax Acts the provisions of the two acts were consolidated in Sections 6001-7176 of the Revenue and Taxation Code.

[14] Retail Sales Tax Act, Sec. 2b; Stats. 1933, p. 2599, as amended; Stats. 1939, p. 1256; Revenue and Taxation Code, Sec. 6006.

[15] Sales Tax Rules and Regulations No. 26; Appendix "B."

commerce clause as well as by the export-import clause.

The decisions of this Court to the effect that taxes on transactions such as that involved in the case at bar do not burden commerce, therefore, necessarily include a determination that the tax is not a duty on exports.

As we will demonstrate, the constitutional debates and the history of the interpretation of Article I, Section 10, Clause 2 by this Court support our position.

There are no cases dealing directly with the validity of a tax upon the privilege of selling at retail where the tax is measured exclusively by receipts from local sales. In the following discussion we have sometimes referred to the California tax as a tax upon the sale. However, sales at wholesale are not taxed, nor are casual sales at retail. Since the tax is imposed upon a local privilege and not upon the sale itself nor directly upon the receipts from the sale, it is one step further removed from commerce than the cases hereinafter discussed.

The privilege taxed in *Crew-Levick* v. *Pennsylvania*, 245 U.S. 292, was that of selling at wholesale. The Indiana Gross Receipts Tax discussed in *Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307, was imposed upon the privilege of receiving gross receipts and all of the sales involved in that case were at wholesale.

The economic effect of a tax upon the business of selling at wholesale differs materially from a tax upon the privilege of selling at retail, for there are relatively few cases in which sales in interstate or foreign commerce are made directly to the consumer.

IV. The Constitutional Convention

While historians agree that the problem of the regulation of trade between the States and with foreign countries was one of the most important factors in the calling of the Constitutional Convention, the records of the constitutional debates revealed comparatively little regarding the discussion of the subject of the taxation of imports and exports.

The purpose of the inclusion of the prohibition against the taxation of exports was to protect the inland States from the levies by the coastal States.[16] But two of the leaders in the convention expressed the idea that the commerce clause would provide sufficient protection to the inland States. Madison's notes on the Convention state that Oliver Ellsworth of Connecticut saw no reason for the prohibition of the taxation of exports by the States, saying that "The power of regulating trade between the States will protect them against each other."[17] Madison himself is quoted as saying that "perhaps the best guard against the abuse of the power of the States on this

---

[16] *The Federalist* No. 42.
Farrand: The Record of the Federal Convention, Vol. 2, pp. 305-8, 359-363, 441-442, 589.
Woodruff v. *Parham*, 8 Wall. 123, 134.
[17] Farrand: supra, Vol. II, pp. 359-360.

subject, was the right in the General Government to regulate trade between State and State.[18]

It is apparent, however, that the inland States were not satisfied with these assurances and demanded the express prohibition of such levies. It is possible that they believed that the commerce clause did no more than to give Congress the power to forbid such taxes [19] or it may have been that they simply were uncertain as to how much protection the commerce clause would provide.

In any event there is nothing in the debates which shows that the members of the Convention thought that the export-import clause was to be construed to forbid the levy of any taxes which the Court has now held to be proper under the commerce clause.

In the debate upon the addition of the exception to the export-import clause ("except what may be absolutely necessary for executing its inspection laws") it was stated by Gouvernor Morris that he "did not consider the dollar per hogshead laid on tobacco in Virginia as a duty on exportation, as no drawback would be allowed on tobacco taken out of the warehouse for internal consumption."[20]

Thomas Fitzsimons likewise expressed the idea that nondiscriminatory excises did not amount to a duty on exports, saying, "Incidental duties on tobacco and

[18] Farrand, supra, Vol. II, p. 360.
[19] See Chief Justice Taney's opinions in the License cases (5 How. 573, 593) and in the Passenger cases (7 How. 597, 60[illegible]).
[20] Farrand, supra, Vol. II, p. 589.

flour never have been and never can be considered as duties on exports."[21]

It would seem that if the exponents of States rights in the Convention had thought that the export-import clause would be interpreted to preclude the levy of nondiscriminatory excises, they would have objected vehemently to the provision. Actually the export-import clause received little attention even from such bitter opponents of the Constitution as Luther Martin.[22] No member of the Convention expressed the idea at any time that the export-import clause would preclude the levy of general taxes applicable alike to domestic and foreign goods.

V. Cases Dealing with the Taxation of Exports by the States

There are few cases in which this Court has passed squarely upon a question involving the application of Art. I, Sec. 10, Clause 2 to the taxation of exports.

In *Almy* v. *California*, 24 How. 169, it was held that a California tax on bills of lading, measured by the value of goods shipped in interstate commerce, was invalid. While the case was overruled in *Woodruff* v. *Parham*, 8 Wall. 123, insofar as it applied the export-import clause to interstate commerce, it is clear that that the tax was levied upon the movement of goods itself; that it burdened commerce and that it would

[21] Farrand: supra, Vol. II, p. 589.

[22] See "Genuine Information" published by Martin, December 12, 1787; Farrand: supra, Vol. III, pp. 172 to 233; particularly, pp. 215-216.

have been properly treated as a duty on exports if the goods had moved in foreign commerce.[23]

In *Brown* v. *Houston*, 114 U.S. 622, 629, the contention was made that coal at rest in New Orleans was exempt from taxation as an export since it was thereafter sold to steamers bound for foreign ports. On the tax day the coal was held for sale in New Orleans to whomsoever might desire to purchase it and the Court held that the general nondiscriminatory tax did not constitute a duty on exports. Mr. Justice Bradley speaking for the Court said:

> "A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine."

The next case, in point of time, dealing directly with the taxation of exports by a State was *Crew Levick Co.* v. *Pennsylvania*, 245 U.S. 292. However, in *Coe* v. *Errol*, 116 U.S. 517, 525-527, a case involving interstate commerce, the Court, again speaking through Mr. Justice Bradley, said:

> "Of course they can not be taxed *as* exports; that is to say, they can not be taxed by reason of or because of their exportation or because of their intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution which prohibits any

[23] Compare *Fairbank* v. *U.S.*, 181 U.S. 283, discussed, infra, p. 26.

State, without the consent of Congress, from laying any imposts or duties on imports or exports; and, although it has been decided, *Woodruff* v. *Parham*, 8 Wall. 123, that this clause relates to imports from, and exports to, foreign countries, yet when such imposts or duties are laid on imports or exports from one State to another, it can not be doubted that such an imposition would be a regulation of commerce among the States, and, therefore, void as an invasion of the exclusive power of Congress. See *Walling* v. *Michigan*, ante, 446, decided at the present term, and cases cited in the opinion in that case. But if such goods are not taxed as exports, nor by reason of their exportation, or intended exportation, but are taxed as part of the general mass of property in the State at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? * * *.

"* * * such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey."

This case correctly limits the application of the export-import clause to cases in which the tax discriminates against exports, or taxes the actual movement of goods or taxes the goods themselves after their ultimate passage outside the State has commenced, or after their commitment to a common car-

rier.[24] It also demonstrates that those taxes which are forbidden by the export-import clause are also forbidden by the commerce clause.

Crew-Levick v. *Pennsylvania*, 245 U.S. 292, involved a tax on wholesalers measured by gross receipts which the Court described as a State tax imposed upon the business of selling goods in foreign commerce." The Court stated that while the question involved was dual in form it might "be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms."

The sales involved in that case were foreign sales. This necessarily means that in that case the purchaser did not come into the State of Pennsylvania to take delivery of the goods.

The *Crew-Levick* case was followed in *Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307, where the Court held that the commerce clause forbade the taxation of the gross receipts of commerce whether the sales were made in interstate or foreign commerce. The export-import clause was not relied upon by the taxpayer in that case. It is apparent that in that case also the purchasers did not come into the State to accept delivery.

There are, therefore, but three cases in which the Court has held that a State tax constitutes a duty on

[24] Appellant states that the case holds that an immunity attaches to goods exported "upon their first movement towards the sea." We find no such language in the Court's opinion.

exports. In each case the Court has reached the same result as it would have reached had the commerce clause alone been relied upon by the taxpayer.

Furthermore, in *Coe* v. *Errol,* supra, the Court clearly stated that a duty or tax upon an export would necessarily be a burden or regulation of commerce. While in a sense this statement may be said to be dictum, it was actually made as a step in the Court's reasoning. The Court, in substance, determined that the tax in question was not a tax on an export and concluded, therefore, that it did not burden commerce.

Appellant relies upon *Blount* v. *Munroe* (1878), 60 Ga. 61, 68, and *Clarke* v. *Clarke* (1877), 3 Woods 408, Fed. Case No. 2846. Both cases were decided prior to the decisions in *Brown* v. *Houston,* supra (114 U.S. 622), and *Coe* v. *Errol,* supra (116 U.S. 517), and appear to be contrary to those decisions.

In each of those cases the logs were in the possession of the exporter and the exporter was an alien engaged solely in the business of exporting logs. Contracts had been made for the sale of all of the logs and some of the logs purchased that season had actually been shipped prior to the tax day. The conclusion that the goods had been separated from the general mass of property on the tax day is, however, inconsistent with the decision in *Coe* v. *Errol,* supra.

VI. Cases Involving the Taxation of Exports by the United States and Their Relation to the Commerce Clause Cases

The first case of importance applying Article I, Section 9, Clause 5 of the Constitution is *Turpin* v. *Burgess,* 117 U.S. 504. The decision there was based upon two grounds. It was held that the tax involved was not a tax on articles at all but the Court continued to hold that even if the tax involved were treated as a tax on goods which were exported it was valid. The Court observed that the prohibitions upon the taxation of exports by the States and the Federal Government were substantially the same and it relied upon *Coe* v. *Errol* as establishing the proposition that a nondiscriminatory tax levied upon events occurring prior to exportation was not a duty or import on exports. The Court said (117 U.S. 504, 507):

> "It is true, as was conceded in Coe v. Errol, that the prohibition to the States against laying duties on imports or exports related to imports from and exports to foreign countries; yet the decision in that case was based on the postulate that when such imports or duties are laid on imports and exports from one State to another it amounts to a regulation of commerce among the States, and, therefore, is an invasion of the exclusive power of Congress. So that the analogy between the two cases holds good, and what would be constitutional or unconstitutional in the one case would be constitutional or unconstitutional in the other."

In *Fairbank* v. *United States,* 181 U.S. 283, the Court held that an act of Congress imposing a tax on bills of lading was unconstitutional as being levied directly on the process of exportation.. Among the cases relied upon was *Robbins* v. *Shelby County,* 120 U.S. 489, a leading case in the field of interstate commerce. The Court rejected the argument made by the Solicitor General that the history of the constitutional debates disclosed that the purpose of Article I, Section 9, Clause 5 was merely to prevent the levy of excises on particular kinds of articles which would prove discriminatory because the articles were exported from only a few States. It held, rather, that a tax levied directly upon the process of exportation was a tax on "articles exported."

The *Fairbank* case was followed in *United States* v. *Hvoslef,* 237 U.S. 1, and *Thames and Mersey Ins. Co.* v. *United States,* 237 U.S. 19. The *Hvoslef* case involved a Federal tax on charter parties and the *Thames and Mersey* case a tax on ocean marine insurance. In each case the Court held that the tax fell directly upon the process of exportation and was, therefore, invalid. Again strong reliance was placed upon *Robbins* v. *Shelby County,* supra, the Court expressing the view that a tax burdening exportation was forbidden in much the same manner as were State taxes burdening commerce.[25]

[25] For a criticism of these three cases see Goodwin: *United States* v. *Hvoslef.* A Constitutional Source of National Revenue Impaired, 29 Harv. L. R. 469.

In *Cornell* v. *Coyne*, 192 U.S. 418, a tax on filled cheese was upheld as it applied to cheese which was exported. In this case, also, the Court referred to the analogy to the Commerce Clause and held that the manufacture of goods could be taxed because commerce did not begin until after manufacture was completed.[26]

In *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, a tax on baseballs and baseball bats was held invalid as applied to equipment sold to a Venezuelan firm through a New York commission merchant. A tax equivalent to 3 per cent of the selling price was imposed upon sporting goods "sold by the manufacturer, producer or importer." Scholtz & Co., the commission merchant, pursuant to an order received from a Venezuelan firm, purchased baseballs and baseball bats from the taxpayer. Scholtz & Co. paid the taxpayer for the goods and was thereafter reimbursed by the foreign purchaser. The goods were delivered directly to the dock by the taxpayer and did not come into the possession of the commission merchant at any time. The Court treated the transaction as a single sale and emphasized that the purchase by Scholtz & Co. was solely for the purpose of the ultimate purchaser and for its account and risk. In reaching its conclusion the Court relied primarily upon *Railroad Commission of Louisiana* v. *Texas & Pacific Ry. Co.*, 229 U.S. 336, and *Texas & New Orleans R. R. Co.* v. *Sabine Tram Company*, 227 U.S. 111, cases involving

[26] Compare *American Manufacturing Co.* v. *St. Louis*, 250 U.S. 459.

the power of Congress to regulate interstate commerce.

In *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390, a case involving the application of the commerce clause to a transaction similar to that in the case at bar, Mr. Justice Holmes distinguished the *Spalding* case stating that the delivery direct to the purchaser marked the difference between that case and the *Spalding* case. There is no question but that Justice Holmes considered the holding in the *Spalding* case applicable to cases arising under the commerce clause and that he treated the question arising under the two clauses as identical.

In his brief the Solicitor General took the position that Article I, Section 9, Clause 5 did not preclude the levy of nondiscriminatory taxes and that none of the cases decided under the commerce clause were controlling. He failed to point out to the Court that the Texas railroad cases upon which counsel for the taxpayer, and the Court, relied involved the power of Congress to regulate commerce rather than the power of the States to tax events related to commerce.

This distinction was clearly pointed out in *Minnesota* v. *Blasius*, 290 U.S. 1, 8, where the Court speaking through Chief Justice Hughes said:

> "But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a State may not lay a nondiscrimina-

tory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the State. The distinction was recognized in *Stafford* v. *Wallace,* (258 U.S. 495), supra, pp. 525, 526, where the Court cited, as an illustration, the case of *Bacon* v. *Illinois,* 227 U.S. 504, in which such a non-discriminatory property tax was sustained. And the Court in the Stafford case quoted from the opinion in the Bacon case (supra, p. 516) the following statement of distinction: 'The question' (that is, as to the validity of the state tax) 'it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority'."

This same distinction was noted by the Court speaking through Mr. Justice McKenna in *Susquehanna Coal Co.* v. *South Amboy,* 228 U.S. 665, where the Court upheld a tax on coal stored in a New Jersey yard while en route from Pennsylvania to New York.[27]

There was a period during which the Court seldom referred to this distinction. In a series of cases involving the taxation of personal property in transit, the

[27] Mr. Justice McKenna was also the author of the opinions in *Texas & New Orleans Railroad Company* v. *Sabine Tram Company,* supra, (227 U.S. 111) and *Railroad Commission of Louisiana* v. *Texas & Pacific Railway Co.,* 229 U.S. 336. All three cases were decided during the October 1912 term. *Bacon* v. *Illinois,* 227 U.S. 504, which also involves the taxation of personal property in transit, was decided at the same term and *Banker Brothers* v. *Pennsylvania,* 222 U.S. 210, which upheld a sale tax imposed by the buyer's state, was decided during the October 1911, term. The holding that Congress had power to regulate shipments within a State where a subsequent foreign shipment was merely anticipated was not therefore intended to cut off the power of the State to tax the goods when the first movement commenced.

Court, speaking through Chief Justice Taft, assumed that the regulatory cases were controlling.[28] The *Spalding* case was decided during this period. There is nothing in the opinion which would support the view that the Court intended to lay down a rule to the effect that different principles are to be applied in deciding whether a tax was levied on exports themselves than those applied in determining whether a tax improperly burdens commerce.

Unquestionably the case would have been decided the same way if a State tax had been involved and the goods had gone to Florida instead of Venezuela.

The Court said:

> "To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. *As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary.* In this case, for instance, while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants. *Cornell* v. *Coyne*, 192 U.S. 418. *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245. On the other hand no one would doubt that they were exempt

---

[28] *Champlain Realty Co.* v. *Town of Brattleboro*, 260 U.S. 366; *Hughes Bros. Timber Co.* v. *Minnesota*, 272 U.S. 469, 474; *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95, 106-108. In the latter case the State Court distinguished the regulatory cases (166 La. 378; 117 So. 432) on the basis here stated, but the point is not mentioned in this Court's opinion. The Minnesota Supreme Court was then convinced that the cases involving regulation were controlling (*State* v. *Blasius*, 187 Minn. 420; 245 N.W. 612), It learned of its error in *Minnesota* v. *Blasius*, supra, 290 U.S. 1.

after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun." (Emphasis added.)[29]

In *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395, the Court, again speaking through Mr. Justice Holmes, said:

"The importance of the commerce clause to the Union of course is very great. But it also is important to prevent that clause being used to deprive the States of their lifeblood by a strained interpretation of facts. *We may admit that this case is near the line.* There was a regular course of business known to the appellant, that took the gasoline into another State, and if by mutual agreement the oil had been put into the hands of a third person, a common carrier, for transportation to Louisiana the mere possibility that the vendor might be able to induce the carrier to forego his rights might not have been enough to keep the transaction out of interstate commerce. *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, (a case of foreign export, see *Sonneborn Brothers* v. *Cureton*, 262 U.S. 506, 520, 521). But here the gasoline was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes." (Emphasis added.)

In drawing a line between deliveries to the purchaser and deliveries to a common carrier the Court

[29] *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, 69.

intended to lay down a rule applicable to foreign and interstate commerce alike.

Appellant also relies upon *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U.S. 90. In that case it was held that a tax on the business of loading and unloading ships was a regulation of commerce. Appellant argues that the case holds that the loading of ships is commerce and that therefore a tax on sales consummated by delivery to a ship is forbidden. If Appellant is correct, the *Puget Sound* case and the *Wood Preserving* case are irreconcilable for there can be no distinction between the loading of ships and the loading of railroad cars, and the *Puget Sound* case involves the application of the commerce clause not the export-import clause.

The distinction between the *Puget Sound* case and the case at bar lies in the difference in the things taxed. In the one case the transfer of the goods from dock to ships was taxed. In this case the tax is on the sale, the privilege of selling within the borders of the State, and the word "sale" is defined by statute to include the transfer of title or possession or both. The tax is measured by the receipts from the sale rather than by the receipts from loading or unloading. Furthermore, it is conceivable that a tax on loading and unloading could be used as a device to hamper interstate and foreign commerce while it is clear that the tax involved here could not be so used.

The Court's statement in the *Puget Sound* case that the loading and unloading of ships "is commerce"

is, in any event difficult to reconcile with the holdings of later cases.[30]

VII. Cases Involving the Taxation of Imports by the States

In *Brown* v. *Maryland,* 12 Wheat. 419, the Court held that a tax levied upon the occupation of importer was invalid. The Court based its decision upon both the commerce clause and the export-import clause. Since the tax was discriminatory there is no question but that it was a regulation of commerce as well as being, in substance, a tax on imports. However, in the course of its opinion the Court announced the "original package" doctrine.

In two cases the Court has applied this doctrine to hold invalid nondiscriminatory property taxes on goods while they remained in the original package.[31] In a number of other cases the Court has assumed that the doctrine was generally controlling but has held that in the particular case it was not applicable,[32] but there are no other cases which actually apply the original package doctrine to invalidate a tax which would not have been held invalid under the commerce clause.

In neither *Low* v. *Austin,* supra, nor *Hooven & Allison* v. *Evatt,* supra, did the Court recognize that the original package doctrine was enunciated as dic-

[30] Compare: *Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250; *Department of Treasury* v. *Wood Preserving Corp.,* supra, 313 U.S. 62, and see *Joseph* v. *Carter & Weekes Stevedoring Co. No. 29,* October, 1946, term.

[31] *Low* v. *Austin,* 13 Wall. 29; *Hooven & Allison* v. *Evatt,* 324 U.S. 652.

[32] *Waring* v. *The Mayor,* 8 Wall. 110; *May* v. *New Orleans,* 178 U.S. 496; *Austin* v. *Tennessee,* 179 U.S. 343; *Burke* v. *Wells,* 208 U.S. 14, *Gulf Fisheries* v. *MacInerney,* 276 U.S. 124.

tum, insofar as it applied to nondiscriminatory taxes, and in neither case did the Court consider the language of the constitutional provision or the history of the constitutional debates.

On the other hand it has been noted by the Court in a number of other cases, that the tax involved in *Brown* v. *Maryland*, supra, was a discriminatory tax[33] and there is even a question as to whether Chief Justice Marshall intended that the doctrine should apply to nondiscriminatory taxes.

After stating that the Courts supposed the principles laid down to apply equally to importations from sister States, the Court said (12 Wheat. 419, 449);

> "We do not mean to give any opinion on a tax discriminating between foreign and domestic articles."

The tax actually involved was discriminatory and it is apparent that if a nondiscriminatory tax were invalid it would necessarily follow that a discriminatory tax would likewise fall. It therefore seems possible that the word "not" was inadvertently omitted from the sentence by the reporter in his report of the opinion.

Further support for this view is found in the following discussion of the right of the States to tax related occupations. Chief Justice Marshall said:

> "The counsel for the defendant in error have endeavored to illustrate their proposition, that the

[33] *Welton* v. *Missouri*, 91 U.S. 275; *Cook* v. *Pennsylvania*, 97 U.S. 566; *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U.S. 218, 238 (dissenting opinion).

constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of dutes, he may, they say, exert that right when, where, and as he pleases, and the State cannot regulate it. He may sell by retail, at auction, or as an itinerant pedlar. . . .

"This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State, by breaking up his packages, and traveling with them as an itinerant pedlar. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer. . . .

"So, if he sells by auction. *Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other for which he may apply to an officer of the State. The right*

of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way." (Emphasis added).[34]

The italicized language indicates that Marshall would have had no objection to a nondiscriminatory tax levied upon a privilege closely related to interstate or foreign commerce such as the tax upon the privilege of selling at retail. . . .

Marshall's dictum has of course been repudiated in so far as it was thought to apply to nondiscriminatory taxes on goods which have completed an interstate journey. In such cases the Court has frequently said that the original package doctrine applies to imports from foreign countries, but such statements were not necessary to the decision.[35]

In *Cook* v. *Pennsylvania*, 91 U.S. 566, the tax involved was discriminatory. Auctioneers selling imported goods were taxed at a higher rate than auctioneers selling domestic goods. The tax was expressly held to be invalid upon the ground that it was discriminatory.[36]

In *Anglo Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U.S. 218, both the commerce clause and the export-import clause were relied upon in holding a franchise tax invalid as measured by the value of imported goods which remained in their original packages

[34] 12 Wheat. 419, 442.

[35] *Woodruff* v. *Parham*, supra; *Sonneborn Bros.* v. *Cureton*, 262 U.S. 506.

[36] Marshall's dictum to the effect that a non-discriminatory tax on auctioneers would be valid is consistent with this case.

(Justices Cardozo, Brandeis and Stone dissenting.) The Court said (p. 225):

> "The question whether, consistently with the import and commerce clauses, the Alabama statute may be construed to require appellant to pay the specified franchise tax is dual in form but single in substance, for, upon the facts of this case, it is clear that if the exaction is a tax on imports it necessarily burdens foreign commerce. *Crew-Levick* v. *Pennsylvania*, 245 U.S. 292, 295."

In *Hooven & Allison* v. *Evatt*, supra, 324 U.S. 652, the brief filed by the Attorney General of Ohio did not present the point that the export-import clause did not forbid the imposition of nondiscriminatory taxes on goods even while they remained in their original packages. As a result *Low* v. *Austin*, supra, 13 Wall. 29, has never been reexamined.[37]

There are, therefore, but two cases in which the Court has held a tax to be invalid upon the basis of the export-import clause where the same tax would not have been held invalid under the commerce clause. Each of these cases was based upon the application of the original package doctrine as it was expounded in *Brown* v. *Maryland*, supra. Neither one explains how it could be possible that a duty or tax on imports would not at the same time be an improper burden on commerce.

[37] For a discussion of the decision in *Hooven & Allison* v. *Evatt*, see 58 Harv. L. R. 858; 45 Col. L. R. 661; 20 Ind. L. J. 320.

There are, on the other hand, a number of cases in which the Court has stated expressly that the two clauses impose substantially the same prohibition.[38]

Appellant asks the Court to extend the rule applied in *Low* v. *Austin*, supra, to exports. It argues that the Court has held some taxes to be duties on imports although they do not burden commerce and that the Court should, therefore, hold some taxes to be duties on exports although it is plain that such taxes do not burden commerce. The Court, we submit, rejected this contention in *Coe* v. *Errol*, (116 U.S. 517. See the discussion, supra, pp. 21-22).

The application of a counter part of the original package doctrine to exports is not warranted in view of the doubts as to the soundness of the doctrine itself and it is not required by the doctrine of *stare decisis* or by any other legal principle.

In any event such an application would hardly assist appellant since it is plain that in this case the purchaser and not the Appellant was the exporter.[39] Since sales by one who buys from an importer may be taxed,[40] it would seem to follow that one who sells to the exporter may be taxed on his sales.

---

[38] *Brown* v. *Maryland*, supra; *Crew-Levick* v. *Pennsylvania*, supra; *Coe* v. *Errol*, supra; *Anglo. Chilean Nitrate Co.* v. *Alabama*, supra.

[39] *Krauter* v. *Menchacattorre*, 195 N.Y.S. 361, 363, and compare *Hooven & Allison* v. *Evatt*, 324 U.S. 652.

[40] *Waring* v. *The Mayor*, 8 Wall. 110.

CONCLUSION

The California Sales Tax is imposed upon the privilege of selling tangible personal property at retail within the borders of the State. The inclusion of receipts from local sales in the measure of the tax is not forbidden by the export-import clause merely because the purchaser thereafter takes the goods to another State or country.

This Court has repeatedly held that a sale consummated by delivery to the purchaser in the seller's State is a local event. The export-import clause does not preclude the taxation of such sales nor the inclusion of the receipts from such sales in the measure of a tax levied upon the privilege of making local retail sales.

It is respectfully submitted that the judgment of the California Supreme Court is correct and that it should be affirmed.

ROBERT W. KENNY,
Attorney General of the
State of California,

JOHN L. NOURSE,
Deputy Attorney General of
the State of California,
Counsel for Appellee.

APPENDIX A

Retail Sales Tax Act

SECTION 2(b)

"Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes the fabrication of tangible personal property for consumers who furnish either directly or indirectly the materials used in the fabrication work and the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale.

(Stats. 1933 p. 2599 as amended Stats. 1935 p. 1256.)

(Revenue and Taxation Code, Sec. 6006.)

SECTION 3

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter pro-

vided and shall be in addition to any and all other taxes.

(Stats. 1933 p. 2600 as amended Stats. 1935 p. 1253.)
(Revenue and Taxation Code, Section 6051.)

SECTION 5(a)

The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

(Stats. 1933 p. 2601.)
(Revenue and Taxation Code, Sec. 6352.)

SECTION 8

It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

(Stats. 1933 p. 2602.)
(Revenue and Taxation Code, Sec. 6053.)

SECTION 8½

The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. This section is hereby declared to be separable and distinct from all other portions of this act, and shall not be deemed a consideration or inducement for the enactment of the whole or any portion of this act. If this section be for any reason declared invalid, the remainder of this act shall remain in full force

and effect and shall be as completely operative as though this section had not been included herein.

(Stats. 1933 p. 2602.)

(Revenue and Taxation Code, Sec. 6052.)

SECTION 12

Thirty days after the effective date of this act, it shall be unlawful for any person to engage in or transact business as a retailer within this State, unless a permit or permits shall have been issued to him as hereinafter prescribed. Every person desiring to engage in or conduct business as a retailer within this State shall file with the board an application for a permit or permits. Every application for such a permit shall be made upon a form prescribed by the board and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the board may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner thereof; in the case of a corporaton, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. Any person who engages in the business of selling tangible personal property at retail in this State without a permit or permits or after a permit has been suspended, and the officers of any corporation which shall so sell, shall be guilty of a misdemeanor.

(Stats. 1933 p. 2603.)

(Revenue and Taxation Code, Sec. 6066, 6071.)

SECTION 17

The burden of proving that a sale of tangible personal property is not a sale at retail shall be upon the person who makes it, unless such person takes from the purchaser a certificate to the effect that the property is purchased for resale. Such certificate relieves the seller from such burden only if taken in good faith from a person engaged in the business of selling tangible personal property and holding the permit provided for in section 12 of this act and who, at the time of purchasing the tangible personal property, intends to sell it in the regular course of business or is unable to ascertain at the time of purchase whether such property will be sold or will be used for some other purpose. Such certificate shall be signed by and bear the name and address of the purchaser, shall indicate the number of the permit issued to such purchaser under this act, and shall indicate the general character of the tangible personal property sold by such purchaser in the regular course of business. Such certificate shall be substantially in such form as the board may prescribe.

If a purchaser who gives such a certificate makes any use of such property other than retention, demonstration, or display while holding it for sale in the regular course of business, such use shall be deemed a retail sale by such purchaser as of the time such property is first used by him and the cost of such property to him shall be deemed the gross receipts from such retail sale. If the sole use of such property other than retention, demonstration or display in the regular course of business, is the rental of the property while holding it for sale, the purchaser may elect to include in his gross receipts the amount of the

rental charged rather than the cost of the property to him.

For the purpose of the proper administration of this act and to prevent evasion of the tax hereby imposed it shall be presumed that all gross receipts are subject to the tax hereby imposed until the contrary is established. If the board is not satisfied with the return or returns of tax made by any retailer, it is hereby authorized and empowered to make an additional assessment of tax due from such retailer based upon the facts contained in the return or returns, or upon any information within its possession or that shall come into its possession. An additional assessment may be made of the amount of tax due for more than one period. The amount of tax so assessed shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the quarterly period for which the amount of such tax or any portion thereof should have been returned until the date of payment. In making an assessment hereunder the board may offset overpayments for a period or periods, together with interest on such overpayments, against underpayments for another period or periods, against penalties, and against the interest on such underpayments. Such interest on underpayments and overpayments shall be computed in the manner set forth in sections 9½ and 23 hereof. If any part of the deficiency for which the additional assessment is imposed is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of 10 per cent of the amount of the additional assessment shall be added thereto. If any part of the deficiency for which the additional assessment is imposed is due to fraud or an intent to evade the tax, a penalty of 25 per cent of the

amount of the additional assessment shall be added thereto. The board shall give to the retailer written notice of such additional assessment. Such notice may be served upon the retailer personally or by mail; if by mail, service shall be made in the manner prescribed by section 1013 of the Code of Civil Procedure and addressed to the retailer at his address as the same appears in the records of the board.

(Stats. 1933 p. 2604 as amended Stats. 1939 p. 2175)

(Revenue and Taxation Code, Sec. 6091-6094; 6481-6486.)

SECTION 21

Except in case of a fraudulent return or neglect or refusal to make a return or claim for additional tax pursuant to section 20 hereof, every notice of additional tax proposed to be assessed hereunder shall be mailed to the retailer within three years after the fifteenth day of the calendar month following the quarterly period for which the tax is proposed to be assessed or within three years after the return is filed, whichever period expires the later.

(Stats. 1933 p. 2606 as amended Stats. 1935 p. 1261, Stats. 1939 p. 2178.)

(Revenue and Taxation Code, Sec. 6487.)

SECTION 23

If the board determines that any amount, penalty or interest has been paid more than once, or has been erroneously or illegally collected, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of what was legally due, and the person from whom it was collected, or by whom paid, and if approved by the State Board of Control the excess amount collected or paid shall be credited on any taxes

then due from the retailer under this act or under the California Use Tax Act of 1935 and the balance shall be refunded to the person, or his successors, administrators, or executors. No refund shall be allowed unless a claim therefor is filed with the State Board of Equalization within three years from the fifteenth day after the close of the quarterly period for which the overpayment was made or, with respect to assessments made under the provisions of Sections 17 and 18 hereof, within six months after such assessment became final, or within 60 days from the date of overpayment, whichever period expires the later. No credit shall be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the board within such period.

Every such claim must be in writing and must state the specific grounds upon which the claim is founded.

Failure to file such claim within the time prescribed in this section shall constitute waiver of any and all demands against this State on account of overpayments hereunder. Within 30 days after disallowing any such claim in whole or in part, the board shall serve notice of such action on the claimant, such service to be made as provided by Section 17 hereof.

Interest shall be computed, allowed and paid upon any overpayment of any tax, at the rate of one-half of 1 per centum per month as follows:

(1) From the fifteenth day of the calendar month following the quarterly period for which the overpayment was made but no refund or credit shall be made of any interest imposed upon the claimant with respect to the tax being refunded or credited.

(2) In the case of a refund, to the fifteenth day of the calendar month following the date upon which the

claimant is notified by the board that a claim may be filed or that the claim has been certified to the State Board of Control, whichever date is the earlier.

(3) In the case of a credit to the same date that interest is computed on the tax against which the credit is applied.

Any refund or any portion thereof which is erroneously made and any credit or any portion thereof which is erroneously allowed may be recovered in an action brought by the Controller of the State in a court of competent jurisdiction in the County of Sacramento, in the name of the people of the State of California and such action shall be tried in the County of Sacramento unless the court with the consent of the Attorney General, orders a change of place of trial. The Attorney General must prosecute such action, and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for.

In the event that a tax has been illegally levied, the board shall certify such fact to the State Board of Control and said board shall authorize the cancellation of the tax upon the records of the board.

If the board determines that any overpayment of tax has been intentionally made or made by reason of carelessness, it shall not allow any interest thereon.

(Stats. 1933 p. 2606 as amended Stats. 1941 p. 1328.)

(Revenue and Taxation Code, Sec. 6901-6908; 6961-6963; 6981.)

SECTION 31

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection

under this act of any tax sought to be collected, and no suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been duly filed as provided in section 23 hereof.

Within ninety days after the mailing of the notice of the board's action upon such claim, the claimant may bring an action against the board on the grounds set forth in such claim in a court of competent jurisdiction in the county of Sacramento for the recovery of the whole or any part of the amount with respect to which such claim has been disallowed.

If the board fails to mail notice of action on any such claim within six months after the claim is filed the claimant may, prior to mailing notice of action on such claim by the board, consider the claim disallowed and bring an action against the board on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment. Failure to bring suit or action within the time specified shall constitute a waiver of any and all demands against this State on account of any alleged overpayments hereunder.

If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes due from the plaintiff under this act or under the California Use Tax Act of 1935, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of 6 per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by

not more than thirty days, such date to be determined by the board.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the board to recover any tax paid hereunder, when such action is brought by or in the name of an assignee of the retailer paying said tax, or by any person other than the person who has paid such tax.

(Stats. 1933 p. 2610 as amended Stats. 1939 p. 2184.)
(Revenue and Taxation Code, Sec. 6931-6937.)

APPENDIX B

Sales Tax Rule No. 26

INTERSTATE AND FOREIGN COMMERCE

The California retail sales tax does not apply to gross receipts from sales made in interstate or foreign commerce.

Exempt Transactions

A sale is made in interstate or foreign commerce if:

(a) The property is shipped pursuant to the contract of sale from a point outside this State directly to the purchaser in this State, or to the retailer's agent in this State and redelivered by the agent to such purchaser.

(b) The property is imported into this State from a foreign country and sold by the importer in the original package in which imported.

(c) The property is shipped to a point outside this State, pursuant to the contract of sale either through (1) delivery by the retailer to such point, (2) delivery by the retailer to a carrier for shipment to a consignee at such point or (3) delivery by the retailer to a custom's broker or forwarding agent for shipment outside this State.

Taxable Transactions

A sale is not made in interstate or foreign commerce if:

(a) The property is shipped from a point outside this State to the retailer in this State and redelivered by the retailer to the purchaser here, the retailer being an independent dealer and not the agent of an out of State retailer.

(b) The property is sold and delivered to the purchaser or his representative in this State, even though the disclosed or undisclosed intention of the purchaser is to transport the property outside the State and the property is subsequently so transported.

(c) The property is shipped from a point in this State to another point in this State over a route a portion of which is outside the State.

PROOF. ACTUAL OUT-OF-STATE SHIPMENT ESSENTIAL

Bills of lading or other documentary evidence of the delivery of property to a carrier, custom's broker or forwarding agent for shipment outside the State must be retained by the retailer to establish the character of the transaction. If upon investigation, it is disclosed that the property was diverted in transit or for other reasons was not actually delivered outside the State, the retailer selling the property must pay the tax upon the gross receipts from the sale thereof, even though he has obtained bills of lading or other documentary evidence of delivery of the property to a carrier for shipment outside the State.

O

Rp. 7, 12

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1946.

Richfield Oil Corporation, Appellant, v. State Board of Equalization. } Appeal from the Supreme Court of the State of California.

[November 25, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

This case is here on appeal from the Supreme Court of California which sustained a California tax against the claim that it was repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States. Judicial Code § 237, 28 U. S. C. §§ 344 (a), 861a.

Appellant is engaged in producing and selling oil and oil products in California. It entered into a contract with the New Zealand government for the sale of oil. The price was f. o. b. Los Angeles, payment in London. Delivery was "to the order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank steamer R. F. A. Nucula at Los Angeles, California." The oil was to be consigned to the Naval-Officer-In-Charge, Auckland, New Zealand. Appellant carried the oil by pipe line from its refinery in California to storage tanks at the harbor where the Nucula appeared to receive the oil. When the Nucula had docked and was ready to receive the oil, appellant pumped it from the storage tanks into the vessel. Customary shipping documents were given the master, including a bill of lading which designated appellant as shipper and consigned the oil to the designated naval officer in Auckland. Payment of the price was made in London. The oil was transported to Auckland, no portion of it being used or consumed in the United States. Appellant filed with the Collector of Customs a shipper's export declaration. It did not collect, nor attempt to do so, any sales tax from the purchaser.

Appellee assessed a retail sales tax against appellant measured by the gross receipts from the transaction. The tax was paid under protest, a claim for refund was filed asserting that the levy of the tax violated the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, and this suit was brought to obtain a refund. The California Supreme Court, one justice dissenting, first allowed a recovery on that ground. 155 P. 2d 1. After a rehearing it reversed its position and held the tax constitutional, two justices dissenting. 27 Cal. 2d 150, 163 P. 2d 1.

I. We are met at the outset with the question whether the judgment of the California Supreme Court is a "final judgment" within the meaning of the Judicial Code § 237, 28 U. S. C. § 344 (a). The case was tried on the pleadings and stipulated facts, a jury having been waived. The trial court found for appellant. The Supreme Court ordered that the judgment "be and the same is hereby reversed." The argument is that under California law where a judgment has been reversed without directions, there is a new trial; that on a new trial appellant might amend its complaint and produce other evidence; and that if a new trial were had, new or different findings of fact might be made. See *Erlin* v. *National Union Fire Ins. Co.*, 7 Cal. 2d 547, 61 P. 2d 756.

The designation given the judgment by state practice is not controlling. *Department of Banking* v. *Pink*, 317 U. S. 264, 268. The question is whether it can be said that "there is nothing more to be decided" (*Clark* v. *Williard*, 292 U. S. 112, 118), that there has been "an effective determination of the litigation". *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, 551; see *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 123–24. That question will be resolved not only by an examination of the entire record (*Clark* v. *Williard*, *supra*) but, where necessary, by resort to the local law to determine what effect the

judgment has under the state rules of practice. *Brady* v. *Terminal Railroad Assn.*, 302 U. S. 678; *Brady* v. *Southern Ry. Co.*, 319 U. S. 777. See Boskey, Finality of State Court Judgments under the Federal Judicial Code, 43 Col. L. Rev. 1002, 1005.

This suit is brought under the California Retail Sales Tax Act, § 23 and § 31, which prescribes the sole remedy for challenging the tax. The procedure prescribed is payment of the tax, the filing of a claim for refund which sets forth "the specific grounds upon which the claim is founded", Cal. Stats. 1941, pp. 1328, 1329, and, in case the claim is denied, the institution of a suit within ninety days "on the grounds set forth in such claim." Cal Stats. 1939, pp. 2184, 2185. The claim thus frames and restricts the issues for the litigation. Although the Supreme Court reversed the judgment of the trial court without direction, its decision controls the disposition of the case. See *Estate of Baird*, 193 Cal. 225, 223 P. 974; *Bank of America* v. *Superior Court*, 20 Cal. 2d 697, 128 P. 2d 357. Since the facts have been stipulated [1] and the Supreme Court

---

[1] In California a valid stipulation is binding upon the parties. *McGuire* v. *Baird*, 9 Cal. 2d 353, 70 P. 2d 915; *Webster* v. *Webster*, 216 Cal. 485, 14 P. 2d 522; see 23 Cal. Juris. 826. It is available at a second trial unless in terms otherwise limited, *Nathan* v. *Dierssen*, 146 Cal. 63, 79 P. 739; *Crenshaw* v. *Smith*, 74 A. C. A. 295, 168 P. 2d 752; see 100 A. L. R. 775, and will be controlling at the second trial unless the trial court relieves a party from the stipulation. *First National Bank* v. *Stansbury*, 118 Cal. App. 80, 5 P. 2d 13. Relief from a stipulation may be granted in the sound discretion of the trial court in cases where the facts stipulated have changed, there is fraud, mistake of fact, or other special circumstance rendering it unjust to enforce the stipulation. *Sacre* v. *Chalupnik*, 188 Cal. 386, 205 P. 449; *Back* v. *Farnsworth*, 25 Cal. App. 2d 212, 77 P. 2d 295; *Sinnock* v. *Young*, 61 Cal. App. 2d 130, 142 P. 2d 85; see 161 A. L. R. 1163. In the present case there is no intimation in the record or briefs of fraud, excusable neglect, or other ground for relief. Indeed the parties both accept the stipulation as accurate and complete.

of California has passed on the issues which control the litigation, we take it that there is nothing more to be decided. The jurisdictional objection is thus without merit. See *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 136.

II. We turn then to the merits. Article I, Section 10, Clause 2 of the Constitution provides that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The Supreme Court of California held that this provision did not bar the tax because the delivery of the oil which resulted in the passage of title occurred prior to the commencement of the exportation. The court suggested, and the appellee concedes, that a different result might follow if the oil had been delivered to a common carrier; "for then it would have been placed in the hands of an instrumentality whose *sole purpose* is to export goods, thus indelibly characterizing the process as a part of exportation." 27 Cal. 2d p. 153, 163 P. 2d p. 3. The court, in reaching the conclusion that the tax was constitutional, rested in part on our recent decisions (particularly *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62; *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340) which sustained the levy of certain state taxes against the claim that they violated the Commerce Clause. The court concluded that if this had been an interstate transaction, it would have been subject to the tax. It saw no greater limitation on the power of the States under Article I, Section 10, Clause 2.

than this Court has found to exist under the Commerce Clause.

We do not pursue the inquiry as to the validity of the tax under the Commerce Clause. For we are of the view that whatever might be the result of that inquiry, the tax is unconstitutional under Article I, Section 10, Clause 2.

The two constitutional provisions, while related, are not coterminous. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. *Brown* v. *Maryland*, 12 Wheat. 419; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292. But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was, or had ever been, an import or export. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 665-66, and cases cited. Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the States, even in absence of action by Congress. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761; *Morgan* v. *Virginia*, 328 U. S. —. But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. As recently stated in *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*, p. 48, the law under the Commerce Clause has been fashioned by the Court in an effort "to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed." That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of

the cost of the local government from which it receives benefits (see e. g. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254–55, and cases cited; *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*) and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it. *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434; *Best & Co.* v. *Maxwell*, 311 U. S. 454; *Nippert* v. *Richmond*, 327 U. S. 416.

It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every State from laying "any" tax on imports or exports without the consent of Congress. Only one exception is created—"except what may be absolutely necessary for executing it's inspection Laws". The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against "any" tax a prohibition against "any discriminatory" tax. As we shall see, the question as to what is exportation is somewhat entwined with the question as to what is interstate commerce. But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other.

It is suggested, however, that the history of the Import-Export Clause shows that it was designed to prevent discriminatory taxes and not to preclude the levy of general taxes applicable alike to all goods. Support for that is found in the fact that this provision was defended in the Convention [2] and later in the debates [3] on the ground that it protected the inland States from levies by the coastal

[2] See 2 Farrand, The Records of the Federal Convention (1911), pp. 307, 359–62, 442.

[3] See particularly Madison's statement, 3 Elliot's Debates (2d ed.) p. 483. And see The Federalist No. 42.

States through the taxation of exports. Yet that function was only a phase of a larger design. The Import-Export Clause was considered in connection with Article I, Section 9, Clause 5, which provides that "No Tax or Duty shall be laid on Articles exported from any State."[4] The purpose was to withhold from Congress the power to tax exports,[5] and to deprive any State of the power except with the consent of Congress and even then, it seems, to require the net proceeds to be paid into the federal treasury.[6] A proposal was made to prohibit the States "from taxing the produce of other States exported from their harbours."[7] But that suggestion was not followed. The language adopted was supported by Madison "as preventing all State imposts".[8] The qualified interpretation urged upon us has therefore no substantial support in the history of the Import-Export Clause. Moreover, to infer qualifications does not comport with the standards for expounding the Constitution. As stated by Chief Justice Marshall in *Sturges* v. *Crowinshield*, 4 Wheat. 122, 202, "it would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation." For, as Chief Justice Taney said in *Holmes* v. *Jennison*, 14 Pet. 540, 570–71:

---

[4] See 2 Farrand, op. cit., supra, note 2, pp. 305–08, 358–63, 441–42.

[5] The consensus of opinion was expressed by Gerry—that "the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partially, raising one and depressing another part of it." See 2 Farrand, op. cit., supra, note 2, p. 307. Or as stated by Sherman, "A power to tax exports would shipwreck the whole." Id., p. 308.

[6] See note 1, supra.

[7] This was suggested by Langdon. See 2 Farrand, op. cit., supra, note 2, p. 361.

[8] See 2 Farrand, op. cit., supra, note 2, p. 442.

> "In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning;"

We cannot, therefore, read the prohibition against "any" tax on exports as containing an implied qualification.

The questions remain whether we have here an export within the meaning of the constitutional provision and, if so, whether this tax was a prohibited impost upon it.

The requirement that foreign commerce be involved (*Woodruff* v. *Parham*, 8 Wall. 123, 136) is met, for concededly the oil was sold for shipment abroad. The question whether at the time the tax accrued the oil was an export presents a different problem. There are few decisions of the Court under Article I, Section 10, Clause 2, which illuminate the problem. In *Brown* v. *Houston*, 114 U. S. 622, Louisiana taxed coal held in that State for sale. After the tax was assessed some of the coal was sold for export. The Court held that the coal when taxed was not an export, saying, pp. 629–30:

> "When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But certainly, where a general tax is laid on all property alike, it cannot be construed as a duty on exports when

falling upon goods not then intended for exportation, though they should happen to be exported afterwards."

In *Coe* v. *Errol*, 116 U. S. 517, the Court had before it a case under the Commerce Clause. Logs, cut in New Hampshire, were being held on a river there for transportation to Maine. New Hampshire's non-discriminatory tax on them was sustained. What the Court said concerning commerce is what we deem to be the correct principle governing exports: ". . . goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." P. 527.

That view has been followed in cases involving Article I, Section 9, Clause 5 of the Constitution, which, as we have noted, prohibits Congress from laying any tax on "Articles exported from any State." In *Turpin* v. *Burgess*, 117 U. S. 504, the Court sustained a federal excise tax on manufactured tobacco. The tax was laid upon the goods before they left the factory. The Court said, p. 507, "They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer." The same result was reached in *Cornell* v. *Coyne*, 192 U. S. 418, where a federal manufacturing tax on filled cheese was sustained against the claim that it was a tax levied by Congress on exports. The cheese was manufactured under contract for export. The Court said, "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption

attaches to the export and not to the article before its exportation." P. 427.

That line has been marked by other decisions under Article I, Section 9, Clause 5 of the Constitution. Thus a federal stamp tax on a foreign bill of lading is a tax on exports, since it is the equivalent of a direct tax on the articles included in the bill of lading. *Fairbank* v. *United States*, 181 U. S. 283. The same is true of federal stamp taxes on charter parties made exclusively for the carriage of cargo in foreign commerce. *United States* v. *Hvoslef*, 237 U. S. 1, 17, for a tax on those charter parties is "in substance a tax on the exportation; and a tax on the exportation is a tax on the exports." The same is likewise true of federal stamp taxes on policies insuring exports against maritime risks. *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19. The Court stated, p. 27:

> "The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process."

Closer in point is *Spalding & Bros.* v. *Edwards*, 262 U. S. 66. It involved a federal tax on baseball bats and balls sold by the manufacturer. A Venezuela firm ordered a New York commission house to buy a quantity of bats and balls for their account. The New York commission house placed the order with the manufacturer instructing it to deliver the packages to an exporting carrier in New York for shipment to Venezuela. The goods were delivered to the carrier and an export bill of lading was issued. In due course the goods were transported to Venezuela. The issue, as stated by the Court, p. 68, was "whether the sale was a step in exportation". The Court pointed out that the goods would not have been exempt

from tax while they were "in process of manufacture" though they were intended for export but that they would be exempt "after they had been loaded upon the vessel for Venezuela and the bill of lading issued." The question was whether the "export had begun." After noting that title passed when the goods were delivered into the carrier's hands, the Court stated, pp. 69–70:

> "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result."

The circumstance that title was in the New York commission house and that it might change its mind and retain the goods for its own use was dismissed by the statement that "Theoretical possibilities may be left out of account." P. 70. The Court concluded that if exportation was put at a later point, exports would not receive "the liberal protection that hitherto they have received". P. 70.

This line of cases was summarized in *Willcuts* v. *Bunn*, 282 U. S. 216, 228, as construing the constitutional prohibition against federal taxation of exports so as to give "immunity to the process of exportation and to the transactions and documents embraced in that process. . . . Only on that construction can the constitutional safeguard be maintained."

The fact that delivery to a common carrier for export gave the sale immunity in *Spalding & Bros.* v. *Edwards*, *supra*, is seized upon as stating a rule that the process of exportation has not started until such delivery has been made. And cases like *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, are relied upon as indicating that

delivery to the purchaser is not sufficient. That case arose under the Commerce Clause. Mississippi was upheld in its effort to tax a distributor or wholesaler who purchased gasoline and later took it to Louisiana for sale. The Court said, p. 395, that although the course of business indicated the likely destination of the oil, it was "in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes." The Court held, therefore, that the tax was not on goods moving in interstate commerce. But it added, p. 396, "Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here."

The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would

---

[8] See *Carson Petroleum Co. v. Vial*, 279 U. S. 95.

not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain.

It seems clear under the decisions which we have reviewed involving Article I, Section 9, Clause 5 of the Constitution that the commencement of the export would occur no later than the delivery of the oil into the vessel. As the meaning of "export" is the same under that Clause and the Import-Export Clause (see *Brown* v. *Maryland*, *supra*, p. 445; *Turpin* v. *Burgess*, *supra*, p. 506), the same result follows here.

It is argued, however, that the present tax is not an impost within the meaning of the Import-Export Clause. The tax is measured by the gross receipts of retail sales and is levied on retailers "For the privilege of selling tangible personal property at retail". Cal. Stats. 1935, p. 1253. The retailers are authorized to collect the tax from the consumers. Cal. Stats. 1933, p. 2602. And a sale is "any transfer of title or possession . . . in any manner or by any means whatsoever, of tangible personal property, for a consideration". Cal. Stats. 1935, p. 1256. The California Supreme Court held that the tax is an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales; that it is not laid upon the consumer and does not become a tax on the sale or because of the sale. 27 Cal. 2d p. 152, 163 P. 2d p. 2.

That construction, being a matter of state law, is binding on us. But it is not determinative of the question whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its operation and effect. See *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362; *Kansas City, F. S. & M. Ry. Co.* v. *Kansas*, 240 U. S. 227, 231.

Appellee concedes that the prohibition of the Import-Export Clause would be violated if the goods were taxed as exports or because of their exportation, or if the process of exportation were itself taxed. We perceive, however, no difference in substance between any tax so labeled and the present tax. The California Supreme Court conceded that the delivery of the oil "resulted in the passage of title, and the completion of the sale, and the taxable incident". 27 Cal. 2d p. 153, 163 P. 2d pp. 2–3. The incident which gave rise to the accrual of the tax was a step in the export process.

Moreover, *Brown* v. *Maryland*, *supra*, rejected an argument that while a State could not tax imports, it could tax the privilege of selling imports. Chief Justice Marhsall stated, p. 444:

> "All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution."

The same reasoning was applied to exports, p. 445:

> "The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United

> States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the aricle, and that the legislature had a right to tax occupations?"

The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. *United States* v. *Hvoslef, supra.* What was said there (p. 13) is equally applicable here: "If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it." And see *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218.

We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional.

Reversed.

MR. JUSTICE MURPHY took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1946.

Richfield Oil Corporation, Appellant, *v.* State Board of Equalization.	Appeal From the Supreme Court of the State of California.

[November 25, 1946.]

Mr. Justice Black, dissenting.

Richfield Oil Corporation, while doing business in California, sold oil extracted from California soil. Its purchaser bought the oil to transport and use abroad. California, like many other states, raises a large proportion of its revenue by a generally applied tax on sales.[1] The Court holds that application of the California sales tax to this transaction is a "tax on exports" and therefore violates Article 1, Section 10, Clause 2 of the Federal Constitution. I cannot agree.

In *Spalding* v. *Edwards*, 262 U. S. 66, 69, a precedent upon which today's decision heavily relies, this Court said that "with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary." This principle announced in the *Spalding* case seems to follow what was said in *Cornell* v. *Coyne*, 192 U. S. 418, 427, that the constitutional prohibition against a tax on exports was not intended to relieve exported articles "from the prior

[1] In 1945 California's total revenue was $676,828,000. It collected $242,757,000 from its sales tax. *California State Finances in 1945*; *State Finances: 1945*, Dept. of Commerce, Bureau of the Census (1946) 33.

ordinary burdens of taxation which rest upon all property similarly situated." Every transaction held by this Court to have occurred *after* rather than *before* exportation began makes an encroachment not only on the power of states to tax, but, as the Court points out, the Federal Government's area of taxation is also narrowed. The result of such a holding is all the more serious because, unlike the consequences of holding a state tax invalid under the Commerce Clause, the prohibitions against taxing exports are, with a minor exception, permanent, absolute and unqualified. After today's ruling Congress itself can neither tax nor permit states to tax sales like the one here proscribed. To classify sales transactions as having occurred after exportation began therefore results in creating an island of constitutional tax immunity for a substantial proportion of the profitable business of the nation. Such a result not only grants tax immunity to many profitable businesses which share governmental protections from payment of their fair part of taxes; it also throws an unfair part of the tax burden on others. Since we cannot assume that the framers of the Constitution looked with favor on such consequences, we should, before classifying a transaction in such a way as to render a tax on it unconstitutional, give it the most careful factual scrutiny. We should not invalidate such a tax unless satisfied beyond doubt that it falls squarely and wholly within the area marked by the Constitution for tax exemption.

The economic consequences of such sales taxes are probably about the same as would flow from a property or severance tax applied to Richfield. For all three types of taxes would likely be reflected in an increased sales price of Richfield's oil. No one, I suppose, would think of saying that such a property or severance tax would be unconstitutional as a tax on exports. The reason would be that the taxable event clearly arose before and not after exportation began. This sales tax was no more applied after

export had actually begun than a property or severance tax would have been. The tax was not even levied on an exporter or an exporter's agent or broker. Richfield was neither. Its sale of local California goods was negotiated and completed wholly in California. This purely intrastate sale transaction cannot properly be held to have lost its intrastate pre-exportation status by reason of the fact that the parties did not intend "title to pass" until the oil was delivered at the purchaser's ship. For formal "passage of title" is not an adequate criterion for measuring a state's constitutional power to tax sales made within the state. Private parties are free to decide, so far as their own interests are concerned, when legal title shall be considered to "pass." But a state surely is not required by the Constitution to forbear from taxing that part of a sales transaction which precedes the particular moment the parties have arbitrarily selected for a conceptual transfer of title. Nor need a state withhold the exercise of its power to tax sales until an article is delivered or paid for. That delivery, perhaps the last step in executing this agreement to sell, happened to border on the imaginary line where the actual exporter took possession does not justify us in concluding that therefore the whole sales transaction occurred after exportation. Constitutional interpretations which make serious inroads into the power of both the States and the Federal Government to tax sales made by local businesses should not turn on fine legal concepts of when title passed or delivery occurred in relation to the beginning of exportation.

Concededly, as the Court points out, the Constitution prohibits imposition of state and federal "imposts and duties" on "exports." But the Constitution does not define in words what is an impost or tax on exports and what is not. It is well known that taxation of exports was primarily forbidden by the Constitution at the insistence of inland states which feared that seaboard states would exact

a tribute from all goods sold in the interior which were thereafter transported through ports en route to foreign destinations. It was not intended to bestow a bounty of blanket tax immunity upon all those who engaged in the production, processing, purchase, or sale of goods shipped abroad. There was no broad purpose of encouraging foreign commerce by making all these preliminary steps tax free. The motivation of this tax and its economic consequences plainly are not those which the writers of the Constitution condemned. This was no tax on goods from an inland state which came through California in transit after severance, processing, and sale had been completed. Nor was it a disguised tax on a product of California soil or manufacture imposed solely because the oil was intended for a foreign destination. The tax was nothing more than an effort of California to defray a part of the state's expenses by a uniform sales tax on all those businesses, including Richfield, which enjoyed California's natural resources, the labor of its people, and the services and protection of its government.

True, the tax would impose a burden on export commerce to the extent that it increased the export price of Richfield oil. But if a tax on export sales be unconstitutional for imposing such a burden, so is a property tax or a severance tax applied to Richfield's oil anywhere from well to consumer. For all these types of taxes would likely be reflected in the price of Richfield's oil. But the history and the evolution of the constitutional prohibition against taxation of exports manifest that there was no intention to subsidize either export businesses or foreign purchasers by any such broad immunity from state and federal taxation.

I cannot believe that it was the purpose of the Constitution to let all goods destined for shipment abroad escape uniformly applied state and federal taxes, nor that a state whose resources are depleted is powerless to enforce its

sales tax if the depleter sells to customers for immediate shipment for ultimate use in foreign countries. No persuasive evidence has been produced to indicate that those who wrote the Constitution thought in such terms or that they would have handicapped the state and federal taxing power in such a way. And no other sufficiently cogent reasons have been advanced to require a present interpretation which so disarranges, confuses, and handicaps the sales taxes of all the states.